

**DEPARTMENT OF THE TREASURY****Internal Revenue Service****26 CFR Part 54**

[TD 9985]

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**DEPARTMENT OF LABOR****Employee Benefits Security Administration****29 CFR Part 2590**

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**DEPARTMENT OF HEALTH AND HUMAN SERVICES****45 CFR Part 149**

[CMS-9890-F]

RIN 0938-AV39

**Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges**

**AGENCY:** Internal Revenue Service (IRS), Department of the Treasury; Employee Benefits Security Administration, Department of Labor; Centers for Medicare & Medicaid Services, Department of Health and Human Services (HHS).

**ACTION:** Final rules.

**SUMMARY:** This document finalizes rules related to the fees established by the No Surprises Act for the Federal independent dispute resolution (IDR) process, as established by the Consolidated Appropriations Act, 2021 (CAA). These final rules amend existing regulations to provide that the administrative fee amount charged by the Department of the Treasury, the Department of Labor, and the Department of Health and Human Services (the Departments) to participate in the Federal IDR process, and the ranges for certified IDR entity fees for single and batched determinations, will be set by the Departments through notice and comment rulemaking. The preamble to these final rules also sets forth the methodology used to calculate the administrative fee and the considerations used to develop the certified IDR entity fee ranges. This document also finalizes the amount of the administrative fee for disputes initiated on or after the effective date of these rules. Finally, this document finalizes the certified IDR entity fee ranges for disputes initiated on or after the effective date of these rules.

**DATES:** These final rules are effective on January 22, 2024.

**FOR FURTHER INFORMATION CONTACT:**

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**SUPPLEMENTARY INFORMATION:****I. Background**

*A. Preventing Surprise Medical Bills and Establishing the Federal IDR Process Under the Consolidated Appropriations Act, 2021*

On December 27, 2020, the CAA was enacted.<sup>1</sup> Title I, also known as the No Surprises Act, and title II (Transparency) of Division BB of the CAA amended chapter 100 of the Internal Revenue Code (Code), part 7 of the Employee Retirement Income Security Act (ERISA), and title XXVII of the Public Health Service Act (PHS Act). The No Surprises Act provides Federal protections against surprise billing by limiting out-of-network cost sharing and prohibiting balance billing in many of the circumstances in which surprise bills most frequently arise. In particular, the No Surprises Act added new provisions applicable to group health plans and health insurance issuers offering group or individual health insurance coverage. Section 102 of the No Surprises Act added section 9816 of the Code,<sup>2</sup> section 716 of ERISA,<sup>3</sup> and section 2799A-1 of the PHS Act,<sup>4</sup> which contain limitations on cost sharing and requirements regarding the timing of initial payments and notices of denial of payment by plans and issuers for emergency services furnished by nonparticipating providers and nonparticipating emergency facilities, and for non-emergency services furnished by nonparticipating providers for patient visits to participating health care facilities, generally defined as hospitals, hospital outpatient departments, critical access hospitals, and ambulatory surgical centers.<sup>5</sup>

<sup>1</sup> Public Law 116-260 (Dec. 27, 2020).

<sup>2</sup> 26 U.S.C. 9816, *et seq.*

<sup>3</sup> 29 U.S.C. 1185e, *et seq.*

<sup>4</sup> 42 U.S.C. 300gg-111, *et seq.*

<sup>5</sup> Section 102(d)(1) of the No Surprises Act amended the Federal Employees Health Benefits (FEHB) Act, 5 U.S.C. 8901 *et seq.*, by adding a new subsection (p) to 5 U.S.C. 8902. Under this new provision, each FEHB Program contract must require a carrier to comply with requirements

Section 103 of the No Surprises Act established a Federal IDR process that plans and issuers and nonparticipating providers and facilities may utilize to resolve certain disputes regarding out-of-network rates under section 9816 of the Code,<sup>6</sup> section 716 of ERISA,<sup>7</sup> and section 2799A-1 of the PHS Act.<sup>8</sup> Section 9816(c)(8) of the Code,<sup>9</sup> section 716(c)(8) of ERISA,<sup>10</sup> and section 2799A-1(c)(8) of the PHS Act<sup>11</sup> provide that each party to a determination under the Federal IDR process shall pay a fee for participating in the Federal IDR process, and the amount of the fee is an amount established by the Departments in a manner such that the total amount of fees paid by all parties is estimated to be equal to the amount of expenditures estimated to be made by the Departments for the year in carrying out the Federal IDR process.

Section 105 of the No Surprises Act added section 9817 of the Code,<sup>12</sup> section 717 of ERISA,<sup>13</sup> and section 2799A-2 of the PHS Act.<sup>14</sup> These sections contain limitations on cost sharing and requirements for the timing of initial payments and notices of denial of payment by plans and issuers for air ambulance services furnished by nonparticipating providers of air ambulance services, and allow plans and issuers and nonparticipating providers of air ambulance services to utilize the Federal IDR process.

The No Surprises Act also added provisions to title XXVII of the PHS Act in a new part E<sup>15</sup> that apply to health care providers, facilities, and providers of air ambulance services, such as prohibitions on balance billing for certain items and services and requirements related to disclosures about balance billing protections.

The Departments, along with the Office of Personnel Management (OPM), have issued rules in 2021 and 2022 to implement various provisions of the No Surprises Act. More specifically relevant to this rulemaking, the Departments and OPM issued interim final rules (July 2021 interim final

described in sections 9816 and 9817 of the Code, sections 716 and 717 of ERISA, and sections 2799A-1 and 2799A-2 of the PHS Act (as applicable) in the same manner as these provisions apply with respect to a group health plan or health insurance issuer offering group or individual health insurance coverage.

<sup>6</sup> 26 U.S.C. 9816.

<sup>7</sup> 29 U.S.C. 1185e, *et seq.*

<sup>8</sup> 42 U.S.C. 300gg-111, *et seq.*

<sup>9</sup> 26 U.S.C. 9816(c)(8).

<sup>10</sup> 29 U.S.C. 1185e(c)(8).

<sup>11</sup> 42 U.S.C. 300gg-111(c)(8).

<sup>12</sup> 26 U.S.C. 9817.

<sup>13</sup> 29 U.S.C. 1185f, *et seq.*

<sup>14</sup> 42 U.S.C. 300gg-112, *et seq.*

<sup>15</sup> 42 U.S.C. 300gg-131-139.

rules<sup>16</sup> and October 2021 interim final rules<sup>17</sup> and final rules (August 2022 final rules)<sup>18</sup> implementing provisions of sections 9816 and 9817 of the Code,<sup>19</sup> sections 716 and 717 of ERISA,<sup>20</sup> and sections 2799A–1 and 2799A–2 of the PHS Act.<sup>21</sup> Those rules implement provisions to protect consumers from surprise medical bills for emergency services, non-emergency services furnished by nonparticipating providers for patient visits to participating facilities<sup>22</sup> in certain circumstances, and air ambulance services furnished by nonparticipating providers of air ambulance services. Those rules also implement provisions to establish a Federal IDR process to determine payment amounts when there is a dispute between plans or issuers and providers, facilities, or providers of air ambulance services about the out-of-network rate for these services if a specified State law as defined in 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.30 or an applicable All-Payer Model Agreement under section 1115A of the Social Security Act does not provide a method for determining the total amount payable.

The July 2021 interim final rules and October 2021 interim final rules generally apply to plans and issuers (including grandfathered health plans) for plan years (in the individual market, policy years) beginning on or after January 1, 2022, and to health care providers, facilities, and providers of air ambulance services for items and services furnished during plan years (in the individual market, policy years) beginning on or after January 1, 2022.<sup>23</sup> The August 2022 final rules became effective October 25, 2022, and are applicable for items or services provided or furnished on or after October 25, 2022, for plan years (in the

individual market, policy years) beginning on or after January 1, 2022.

#### *B. October 2021 Interim Final Rules and Related Guidance*

The October 2021 interim final rules implement the Federal IDR process under sections 9816(c) and 9817(b) of the Code,<sup>24</sup> sections 716(c) and 717(b) of ERISA,<sup>25</sup> and sections 2799A–1(c) and 2799A–2(b) of the PHS Act.<sup>26</sup> The rules apply to emergency services, non-emergency services furnished by nonparticipating providers for patient visits to certain types of participating health care facilities<sup>27</sup> (unless an individual has been provided notice and waived the individual's surprise billing protections, in accordance with 45 CFR 149.410 or 149.420, as applicable), and air ambulance services furnished by nonparticipating providers of air ambulance services, for situations in which neither a specified State law as defined in 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.30 nor an All-Payer Model Agreement under section 1115A of the Social Security Act applies.

To implement the Federal IDR process, the October 2021 interim final rules include requirements governing the costs of the Federal IDR process. Under section 9816(c)(5)(F)(i) of the Code,<sup>28</sup> section 716(c)(5)(F)(i) of ERISA,<sup>29</sup> section 2799A–1(c)(5)(F)(i) of the PHS Act,<sup>30</sup> and the October 2021 interim final rules, the party whose offer is not selected is responsible for the payment of the fee charged by the certified IDR entity (certified IDR entity fee).<sup>31</sup> Under the October 2021 interim final rules, as a condition of certification, the certified IDR entity must notify the Departments of the

amount of the certified IDR entity fees it intends to charge for payment determinations, which is limited to a fixed certified IDR entity fee amount for single determinations and a separate fixed certified IDR entity fee amount for batched determinations.<sup>32</sup> Each of these fixed certified IDR entity fees must be within a range set forth in guidance by the Departments, unless the certified IDR entity receives written approval from the Departments to charge a certified IDR entity fee outside that range.<sup>33</sup> The October 2021 interim final rules describe the considerations that the Departments will use to develop the certified IDR entity fee ranges, including the anticipated time and resources needed for certified IDR entities to meet the requirements of those interim final rules, the volume of payment determinations, and the capacity of the Federal IDR process to efficiently handle the volume of IDR initiations and payment determinations, and provide that the Departments will review and update the allowable fee ranges annually based on these factors, the impact of inflation, and other cost increases. Those rules also provide that on an annual basis, the certified IDR entity may update its certified IDR entity fees within the ranges set forth in current guidance and seek approval from the Departments to charge fixed certified IDR entity fees beyond the upper or lower limits for certified IDR entity fees.<sup>34</sup>

Additionally, pursuant to section 9816(c)(8) of the Code,<sup>35</sup> section 716(c)(8) of ERISA,<sup>36</sup> and section 2799A–1(c)(8) of the PHS Act,<sup>37</sup> and under the October 2021 interim final rules, each party must pay an administrative fee for participating in the Federal IDR process. The administrative fee is established in guidance in a manner so that, in accordance with the requirements of section 9816(c)(8)(B) of the Code,<sup>38</sup> section 716(c)(8)(B) of ERISA,<sup>39</sup> and section 2799A–1(c)(8)(B) of the PHS Act,<sup>40</sup> the total administrative fees paid for a year are estimated to be equal to the amount of expenditures estimated to be made by the Departments in carrying

<sup>16</sup> 86 FR 36872 (July 13, 2021).

<sup>17</sup> 86 FR 55980 (October 7, 2021).

<sup>18</sup> 87 FR 52618 (August 26, 2022).

<sup>19</sup> 26 U.S.C. 9816 and 26 U.S.C. 9817.

<sup>20</sup> 29 U.S.C. 1185e, *et seq.* and 29 U.S.C. 1185f, *et seq.*

<sup>21</sup> 42 U.S.C. 300gg–111, *et seq.* and 42 U.S.C. 300gg–112, *et seq.*

<sup>22</sup> References to a “participating facility” in this preamble mean a “participating health care facility,” as defined at 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.30.

<sup>23</sup> The interim final rules also include interim final regulations under 5 U.S.C. 8902(p) issued by OPM that specify how certain provisions of the No Surprises Act apply to health benefit plans offered by carriers under the FEHB Act. These provisions apply to carriers in the FEHB Program with respect to contract years beginning on or after January 1, 2022. The disclosure requirements at 45 CFR 149.430 regarding patient protections against balance billing are applicable as of January 1, 2022.

<sup>24</sup> 26 U.S.C. 9816(c) and 26 U.S.C. 9817(b).

<sup>25</sup> 29 U.S.C. 1185e(c) and 29 U.S.C. 1185f(b).

<sup>26</sup> 42 U.S.C. 300gg–111(c) and 42 U.S.C. 300gg–112(b).

<sup>27</sup> A health care facility, in the context of non-emergency services, is defined as (1) a hospital (as defined in section 1861(e) of the Social Security Act), (2) a hospital outpatient department, (3) a critical access hospital (as defined in section 1861(mm)(1) of the Social Security Act), or (4) an ambulatory surgical center described in section 1833(i)(1)(A) of the Social Security Act. Code section 9816(b)(2)(A)(ii), ERISA section 716(b)(2)(A)(ii), and PHS Act section 2799A–1(b)(2)(A)(ii). 26 CFR 54.9816–3T, 29 CFR 2590.716–3, and 45 CFR 149.30.

<sup>28</sup> 26 U.S.C. 9816(c)(5)(F)(i).

<sup>29</sup> 29 U.S.C. 1185e(c)(5)(F)(i).

<sup>30</sup> 42 U.S.C. 300gg–111(c)(5)(F)(i).

<sup>31</sup> In the case of a batched dispute, the party with fewest determinations in its favor is considered the non-prevailing party and is responsible for paying the certified IDR entity fee. In the event that each party prevails in an equal number of determinations, the certified IDR entity fee will be split evenly between the parties. 86 FR 55980, 56001.

<sup>32</sup> 26 CFR 54.9816–8T(e)(2)(vii), 29 CFR 2590.716–8(e)(2)(vii), and 45 CFR 149.510(e)(2)(vii).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 26 U.S.C. 9816(c)(8).

<sup>36</sup> 29 U.S.C. 1185e(c)(8).

<sup>37</sup> 42 U.S.C. 300gg–111(c)(8).

<sup>38</sup> 26 U.S.C. 9816(c)(8)(B).

<sup>39</sup> 29 U.S.C. 1185e(c)(8)(B).

<sup>40</sup> 42 U.S.C. 300gg–111(c)(8)(B).

out the Federal IDR process for that year.<sup>41</sup>

Contemporaneously with the October 2021 interim final rules, the Departments released the Calendar Year 2022 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act (October 2021 guidance), setting the administrative fee for both parties to a dispute at \$50 per party.<sup>42</sup> The October 2021 guidance also established the range for fixed certified IDR entity fees for single determinations as \$200–\$500, and the range for fixed certified IDR entity fees for batched determinations as \$268–\$670, unless the Departments otherwise grant approval for the certified IDR entity to charge a fee outside these ranges. In October 2022, the Departments released the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act (October 2022 guidance), again setting the administrative fee for both parties to a dispute at \$50 per party.<sup>43</sup> The October 2022 guidance explained that the data available regarding usage of the Federal IDR process was not sufficiently reliable to support a change to either the estimated number of payment determinations for which administrative fees would be paid or the estimated ongoing program costs for 2023; therefore, the 2023 administrative fee amount due from each party for participating in the Federal IDR process would remain the same as the 2022 administrative fee amount. The October 2022 guidance permits certified IDR entities to charge a fee between \$200 and \$700 for single determinations and between \$268 and \$938 for batched determinations, unless the Departments otherwise grant approval for the certified IDR entity to charge a fee outside of these ranges. In addition, to account for the heightened workload for batched determinations, the October 2022 guidance permits a certified IDR entity to charge the following percentage of its approved certified IDR

entity batched determination fee (“batching percentage”) for batched determinations, which are based on the number of line items initially submitted in the batch:

- 2–20 line items: 100 percent of the approved batched determination fee;
- 21–50 line items: 110 percent of the approved batched determination fee;
- 51–80 line items: 120 percent of the approved batched determination fee; and
- 81 line items or more: 130 percent of the approved batched determination fee.

In December 2022, the Departments released the Amendment to the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act: Change in Administrative Fee (December 2022 guidance), which amended the \$50 per party administrative fee set in the October 2022 guidance to \$350 for calendar year 2023.<sup>44</sup> The change in the administrative fee for 2023 reflected the additional costs to the Departments to carry out the Federal IDR process as a result of the Departments’ enhanced role in calendar year 2023 in conducting pre-eligibility reviews to allow the certified IDR entities to complete their eligibility determinations more efficiently,<sup>45</sup> as well as systemic improvements that allowed for the aggregation of data needed to estimate the rate at which disputes were determined eligible for the Federal IDR process and the rate at which one or both parties paid the administrative fee for purposes of calculating the administrative fee. The December 2022 guidance did not amend the certified IDR entity fee ranges provided in the October 2022 guidance.

### C. Recent Litigation

On November 30, 2022, the Texas Medical Association, Tyler Regional Hospital, and a Texas physician filed a lawsuit (*TMA III*)<sup>46</sup> against the Departments and OPM, asserting that

the July 2021 interim final rules,<sup>47</sup> including the regulations governing how the qualifying payment amount (QPA) should be calculated, and certain related guidance documents conflicted with the statutory language. On August 24, 2023, the U.S. District Court for the Eastern District of Texas (District Court) issued a memorandum opinion and order<sup>48</sup> that vacated certain portions of the July 2021 interim final rules and associated regulatory provisions<sup>49</sup> and portions of guidance documents,<sup>50</sup> including portions that provided the methodology for calculating the QPA and interpretations for certified IDR entities related to the processing of disputes for air ambulance services.

On January 30, 2023, the Texas Medical Association, Houston Radiology Associated, Texas Radiological Society, Tyler Regional Hospital, and a Texas physician filed a lawsuit (*TMA IV*)<sup>51</sup> against the Departments and OPM, asserting that the December 2022 guidance<sup>52</sup> that set the \$350 per party administrative fee amount for 2023 was unlawfully issued without notice and comment rulemaking.<sup>53</sup> On August 3, 2023, the District Court issued a memorandum opinion and order<sup>54</sup> vacating the portion of the December 2022 guidance<sup>55</sup> that increased the

<sup>47</sup> 86 FR 36872 (July 13, 2021).

<sup>48</sup> See Memorandum Opinion and Order, *Tex. Med. Ass’n v. U.S. Dep’t of Health & Hum. Servs.*, No. 6:22–cv–00450–JDK, 2023 WL 5489028 (E.D. Tex. Aug. 24, 2023).

<sup>49</sup> Specifically, the District Court vacated certain provisions of 26 CFR 54.9816–6T and 54.9817–1T, 29 CFR 2590.716–6 and 2590.717–1, and 45 CFR 149.130 and 149.140. The District Court also vacated 5 CFR 890.114(a), insofar as it requires compliance with the vacated regulations and guidance.

<sup>50</sup> Specifically, the District Court vacated FAQs 14 and 15 of FAQs about Affordable Care Act and Consolidated Appropriations Act, 2021 Implementation Part 55 (August 19, 2022), as well as portions of *Technical Guidance for Certified IDR Entities* at 2–3 (August 18, 2022).

<sup>51</sup> Complaint, *Tex. Med. Ass’n v. U. S. Dep’t of Health and Human Servs.*, No. 6:23–cv–00059–JDK (E.D. Tex. Jan. 30, 2023) (ECF No. 1).

<sup>52</sup> Centers for Medicare & Medicaid Services (December 23, 2022). *Amendment to the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process Under the No Surprises Act: Change in Administrative Fee*. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/amended-cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

<sup>53</sup> Complaint, *Tex. Med. Ass’n v. U. S. Dep’t of Health and Human Servs.*, No. 6:23–cv–00059–JDK (E.D. Tex. Jan. 30, 2023) (ECF No. 1).

<sup>54</sup> See Memorandum Opinion and Order, *Tex. Med. Ass’n v. U.S. Dep’t of Health & Hum. Servs.*, No. 6:23–cv–00059–JDK, 2023 WL 4977746 (E.D. Tex. Aug. 3, 2023).

<sup>55</sup> Centers for Medicare & Medicaid Services (December 23, 2022). *Amendment to the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the*

<sup>41</sup> 26 CFR 54.9816–8T(d)(2)(ii), 29 CFR 2590.716–8(d)(2)(ii), and 45 CFR 149.510(d)(2)(ii).

<sup>42</sup> Centers for Medicare & Medicaid Services (September 30, 2021). *Calendar Year 2022 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act*. <https://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/Technical-Guidance-CY2022-Fee-Guidance-Federal-Independent-Dispute-Resolution-Process-NSA.pdf>.

<sup>43</sup> Centers for Medicare & Medicaid Services (October 31, 2022). *Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act*. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

<sup>44</sup> Centers for Medicare & Medicaid Services (December 23, 2022). *Amendment to the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act: Change in Administrative Fee*. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/amended-cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

<sup>45</sup> Centers for Medicare & Medicaid Services (November 21, 2022). *Notice of the Federal Independent Dispute Resolution (IDR) Team Technical Assistance to Certified Independent Dispute Resolution Entities (IDREs) in the Dispute Eligibility Determination Process*. <https://www.cms.gov/files/document/idre-eligibility-support-guidance-11212022-final-updated.pdf>.

<sup>46</sup> Complaint, *Tex. Med. Ass’n v. U. S. Dep’t of Health and Human Servs.*, No. 6:22–cv–00450–JDK (E.D. Tex. Nov. 30, 2022) (ECF No. 1).

administrative fee for the Federal IDR process to \$350 per party for disputes initiated during the calendar year beginning January 1, 2023. The District Court also vacated certain provisions of the October 2021 interim final rules setting forth the batching criteria under which multiple IDR items or services may be considered jointly as part of a single IDR dispute.<sup>56</sup> On August 11, 2023, the Departments released guidance<sup>57</sup> to reflect the *TMA IV* opinion and order related to the administrative fee to clarify that the \$50 per party per dispute administrative fee amount established in the October 2022 guidance applies for disputes initiated on or after August 3, 2023, and until the Departments take action to set a new administrative fee amount.

On October 6, 2023, the Departments and OPM released “FAQs About Consolidated Appropriations Act, 2021 Implementation Part 62”<sup>58</sup> to provide guidance related to the *TMA III* opinion and order. On November 28, 2023, the Departments released guidance in accordance with the *TMA III* and *TMA IV* opinions and orders<sup>59</sup> to clarify how certified IDR entities should determine whether a dispute is appropriately

batched and how to submit single and batched air ambulance disputes.<sup>60</sup>

#### *D. Federal Independent Dispute Resolution Operations Proposed Rules*

On November 3, 2023, the Departments published the Federal Independent Dispute Resolution Operations proposed rules<sup>61</sup> (IDR Operations proposed rules). Those proposed rules included new proposed requirements for disclosing information when initiating the Federal IDR process and the provision of certain claims codes with paper or electronic remittances. Additionally, those proposed rules would amend certain requirements related to the open negotiation period, initiation of the Federal IDR process, eligibility determinations, batched disputes, extensions due to extenuating circumstances, and the collection of administrative fees and certified IDR entity fees. Lastly, those proposed rules would require plans and issuers to register with the Federal IDR portal.

With respect to the administrative fee, the Departments proposed in the IDR Operations proposed rules to collect the administrative fee directly from the parties rather than having the certified IDR entities collect the administrative fee on the Departments’ behalf. The Departments also proposed required timeframes for the initiating and non-initiating parties to pay the administrative fee and proposed to establish consequences for non-payment of the administrative fee for each party. Finally, to ensure that the Federal IDR process is accessible to all parties, the Departments proposed to charge both parties a reduced administrative fee when the highest offer made during open negotiation by either party was less than a predetermined threshold and proposed to charge the non-initiating party a reduced administrative fee when the dispute is determined ineligible by either the certified IDR entity or the Departments, as applicable.

To align with these proposals, the Departments also set forth the methodology inputs used to calculate the proposed administrative fee amounts in the preamble to the IDR Operations proposed rules that would be effective for disputes initiated on or after January 1, 2025. The Departments

proposed that the full administrative fee amount would be \$150 per party per dispute, the reduced administrative fee for both parties when the highest offer made by either party during open negotiation was less than the threshold would be \$75 per party per dispute (50 percent of the full administrative fee amount), and the reduced administrative fee for non-initiating parties in ineligible disputes would be \$30 per non-initiating party per ineligible dispute (20 percent of the full administrative fee amount).

The inputs to the methodology set forth in this preamble and the administrative fee amount the Departments are finalizing in these final rules are effective for disputes initiated on or after the effective date of these final rules. In contrast, the proposed administrative fee structure and administrative fee amounts based on inputs to the methodology set forth in the IDR Operations proposed rules, if finalized, would be effective for disputes initiated on or after January 1, 2025. The administrative fee policies finalized in these final rules are effective, and unchanged by the proposals in the IDR Operations proposed rules, unless and until superseding administrative fee policies in the IDR Operations proposed rules are adopted.

#### *E. Public Comments Received in Response to Proposed Rules*

In the September 26, 2023 **Federal Register**, the Departments published the Federal Independent Dispute Resolution (IDR) Process Administrative Fee and Certified IDR Entity Fee Ranges proposed rules (IDR Fees proposed rules),<sup>62</sup> which proposed to amend existing regulations to provide that the administrative fee amount charged by the Departments to participate in the Federal IDR process, and the ranges for certified IDR entity fees for single and batched determinations, would be set by the Departments through notice and comment rulemaking. The IDR Fees proposed rules also discussed the methodology used to calculate the administrative fee and the considerations used to develop the certified IDR entity fee ranges. Finally, the IDR Fees proposed rules proposed the amount of the administrative fee and the certified IDR entity fee ranges for disputes initiated on or after the later of the effective date of these rules or January 1, 2024.

The Departments received 44 comments on many different aspects of the IDR Fees proposed rules. In

*No Surprises Act: Change in Administrative Fee.* <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/amended-cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

<sup>56</sup> Specifically, the District Court vacated the requirement under 26 CFR 54.9816–8T(c)(3)(i)(C), 29 CFR 2590.716–8(c)(3)(i)(C), and 45 CFR 149.510(c)(3)(i)(C) that for a qualified IDR item and service to be considered the same or similar item and service, it must be billed under the same service code or a comparable code under a different procedural code system, such as the Current Procedural Terminology (CPT) codes with modifiers, if applicable, Healthcare Common Procedure Coding System (HCPCS) with modifiers, if applicable, or Diagnosis-Related Group (DRG) codes with modifiers, if applicable.

<sup>57</sup> U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury (August 2023), *Federal Independent Dispute Resolution (IDR) Process Administrative Fee FAQs*. <https://www.cms.gov/files/document/idr-admin-fees-faqs-081123-508.pdf-0>.

<sup>58</sup> See U.S. Department of Health and Human Services, U.S. Department of Labor, U.S. Department of Treasury, Office of Personnel Management (October 6, 2023), *FAQs about Consolidated Appropriations Act, 2021 Implementation Part 62*, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/faqs/aca-part-62.pdf> and <https://www.cms.gov/files/document/faqs-part-62.pdf>.

<sup>59</sup> See U.S. Department of Health and Human Services, U.S. Department of Labor, U.S. Department of Treasury, Office of Personnel Management (November 28, 2023), *FAQs about Consolidated Appropriations Act, 2021 Implementation Part 63*, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebbsa/our-activities/resource-center/faqs/aca-part-62.pdf> and <https://www.cms.gov/files/document/faqs-part-63.pdf>.

<sup>60</sup> See U.S. Department of Health and Human Services, U.S. Department of Labor, U.S. Department of Treasury, Office of Personnel Management (November 28, 2023), *Federal Independent Dispute Resolution (IDR) Process Batching and Air Ambulance FAQs*, available at <https://www.cms.gov/files/document/faqs-batching-air-ambulance.pdf>.

<sup>61</sup> 88 FR 75744.

<sup>62</sup> 88 FR 65888.

particular, the Departments received many comments stating that the administrative fee amount and the certified IDR entity fee ranges create a barrier to accessing the Federal IDR process for many parties, particularly small, rural, or independent providers, and these comments supported retaining the current \$50 per party per dispute administrative fee amount. The Departments also received many comments on the proposed certified IDR entity fee ranges, particularly the proposed additional tiered batched fee range for disputes with more than 25 line items. While some commenters supported the increased flexibility for certified IDR entity fee ranges, many commenters were concerned about the proposed further increases in the certified IDR entity fee ranges. The Departments respond to these comments in section II of this preamble.

Many comments concerned matters that were outside of the scope of the proposed rules and therefore are not addressed in these final rules. For example, the Departments received comments stating that the current Federal IDR process lacks the efficiency needed to resolve disputes quickly. The Departments also received many comments related to the eligibility determination process, including on difficulties determining eligibility in States with a specified State law and the lack of information provided by plans and issuers. Comments on the efficiency of the Federal IDR process and eligibility determinations relate to operations that are outside of the scope of these final rules' limited focus on the administrative fee and certified IDR entity fee ranges and the processes for setting such amounts. The Departments encourage interested parties to submit comments regarding the proposals included in the IDR Operations proposed rules, including the proposal to establish a Departmental eligibility review process, in accordance with the instructions set forth in those proposed rules.<sup>63</sup>

Some other out-of-scope comments addressed the impacts of the Federal IDR portal closure, which occurred in response to litigation previously described in this preamble. For example, the Departments received comments requesting that, as a result of *TMA IV*, the Departments should refund \$300 to each party that paid a \$350 administrative fee between January 1, 2023 and August 3, 2023, and the Departments should offer an extension to parties that would have initiated a dispute if the administrative fee during

that time was \$50, rather than \$350, to now initiate that dispute. The Departments note that this relief was requested by the plaintiffs in *TMA IV* and was denied by the court.<sup>64</sup> Comments also addressed the impact of *TMA III* on the calculation of the QPA, specifically asking the Departments to address underpayments to providers due to purported artificially suppressed QPAs. Additionally, the Departments received comments related to the batching requirements for submission of disputes. Some of these comments addressed specific difficulties in batching emergency medicine, radiology, and anesthesiology services and expressed a desire to broaden the batching criteria. While the IDR Operations proposed rules included proposals related to the batching requirements, these comments were outside the scope of this rulemaking because the IDR Fees proposed rules did not propose any changes to the batching requirements or calculation of the QPA.

Finally, the Departments received many comments suggesting different administrative fee structures. For example, the Departments received comments suggesting that the administrative fee amount be split between the parties, be refundable to the prevailing party, be funded 75 percent by plans and issuers and 25 percent by providers or be payable at the end of the Federal IDR process. The Departments also received comments recommending a variable administrative fee amount tied to the amount in dispute or the QPA, either for all disputes or just for batched disputes. Further comments suggested capping the administrative fee amount or imposing a base administrative fee amount and an additional tiered fee amount based on the amount in dispute.

As a result of the *TMA IV* opinion and order having set aside the Departments' guidance establishing administrative fees, the Departments set a goal of establishing in rulemaking administrative fee amounts that would be effective as close to January 1, 2024 as possible, because the current \$50 administrative fee amount is insufficient to satisfy the statutory requirement that the total amount of fees paid for the year be estimated to be equal to the amount of expenditures estimated to be made for the year in carrying out the Federal IDR process. If the Departments were to continue to impose a \$50 per party per dispute administrative fee amount

throughout 2024, the Departments estimate that they would collect approximately \$24.6 million in administrative fees for the year (492,000 administrative fees paid × \$50 per party per dispute), as discussed further in section IV.D.2.a of this preamble. As discussed further in section II.A of this preamble, the Departments estimate that their expenditures to carry out the Federal IDR process in 2024 will be approximately \$56.6 million. Therefore, if the administrative fee amount remains at \$50 per party per dispute in 2024, the Departments would significantly undercollect administrative fees required to carry out the Federal IDR process. Accordingly, to be able to implement an increase to the administrative fee amount as soon as possible, consistent with the statutory requirement, the IDR Fees proposed rules proposed the amount of the administrative fee and the preamble to the proposed rules described the methodology for calculating it.

The Departments did not propose any changes to the structure of the administrative fee as this would take longer to develop and implement and would be more efficiently operationalized with the changes proposed in the IDR Operations proposed rules, which are intended to be more comprehensive. While the Departments considered alternative fee structures in this rulemaking, the Departments were of the view that addressing the structure of the administrative fee in the IDR Operations proposed rules would give interested parties more time to comment, consider, and prepare for any fee structure change, because the effective date of the IDR Operations proposed rules, if finalized, will be later than the effective date of these final rules.

Additionally, the policies proposed in the IDR Operations proposed rules would require more time for the Departments to develop and implement due to the substantial changes to the Federal IDR portal required by those proposals, if finalized, including adopting new processes to collect the administrative fees directly from the parties and collecting differing amounts of administrative fees from different parties in certain circumstances, as described further in the IDR Operations proposed rules. Therefore, the Departments deferred those proposed changes to the Federal IDR process and administrative fee structure and collection procedures to the IDR Operations proposed rules and prioritized completing this rulemaking.

The Departments encourage interested parties to submit relevant comments

<sup>64</sup> See Memorandum Opinion and Order, *Tex. Med. Ass'n., et al. v. U.S. Dep't of Health and Human Servs., et al.*, No. 6:23-cv-00059-JDK (E.D. Tex. August 3, 2023).

<sup>63</sup> See 88 FR 75744.

regarding batching and the administrative fee structure, the new inputs to the administrative fee methodology, and the amount of the fee proposed in the IDR Operations proposed rules, in response to those proposed rules.<sup>65</sup>

The Departments also sought to establish in rulemaking certified IDR entity fee ranges that would be effective as close to January 1, 2024 as possible, because this effective date would provide predictability for certified IDR entities, who must plan for and finalize their 2024 certified IDR entity fixed fee amounts, and parties, who must budget for their participation in the Federal IDR process taking into account both the administrative and certified IDR entity fees. Establishing the certified IDR entity fee ranges in rulemaking with an effective date close to January 1, 2024 would also allow for greater transparency than the current method of establishing the fee ranges in guidance.

#### *F. Scope and Purpose of Rulemaking*

These final rules amend 26 CFR 54.9816–8(d)(2)(ii) and (e)(2)(vii), 29 CFR 2590.716–8(d)(2)(ii) and (e)(2)(vii), and 45 CFR 149.510(d)(2)(ii) and (e)(2)(vii) to provide that the administrative fee amount and the ranges for certified IDR entity fees for single and batched disputes will be set by the Departments through notice and comment rulemaking, rather than in guidance published annually. The preamble to this rulemaking also sets forth the methodology used to calculate the administrative fee amount and the considerations used to develop the certified IDR entity fee ranges. These rules also finalize the administrative fee amount and certified IDR entity fee ranges for disputes initiated on or after the effective date of these rules. The finalized administrative fee amount and certified IDR entity fee ranges in these rules will remain in effect until changed by notice and comment rulemaking.

The IDR Fees proposed rules proposed that the administrative fee amount and certified IDR entity fee ranges finalized in these final rules would be effective for disputes initiated on or after the later of the effective date of these rules or January 1, 2024. As these final rules will not be effective by January 1, 2024, the Departments are finalizing the proposal that the administrative fee amount and certified IDR entity fee ranges in these rules will be effective for disputes initiated on or after the effective date of these rules, which is 30 calendar days from publication in the **Federal Register**.

## **II. Overview of the Final Rules—Departments of the Treasury, Labor, and HHS**

### *A. Administrative Fee Amount and Methodology*

#### **1. Summary of Proposed and Finalized Policies**

Under section 9816(c)(8)(A) of the Code,<sup>66</sup> section 716(c)(8)(A) of ERISA,<sup>67</sup> section 2799A–1(c)(8)(A) of the PHS Act,<sup>68</sup> and the October 2021 interim final rules,<sup>69</sup> each party to a determination for which a certified IDR entity is selected must pay an administrative fee for participating in the Federal IDR process. Under section 9816(c)(8)(B) of the Code,<sup>70</sup> section 716(c)(8)(B) of ERISA,<sup>71</sup> section 2799A–1(c)(8)(B) of the PHS Act,<sup>72</sup> and the October 2021 interim final rules,<sup>73</sup> the administrative fee is established in a manner such that the total amount of administrative fees paid for a year are estimated to be equal to the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process for that year.

The Departments proposed to establish the amount of the administrative fee through notice and comment rulemaking by amending 26 CFR 54.9816–8(d)(2)(ii), 29 CFR 2590.716–8(d)(2)(ii), and 45 CFR 149.510(d)(2)(ii). The Departments also proposed at 26 CFR 54.9816–8(d)(2)(ii), 29 CFR 2590.716–8(d)(2)(ii), and 45 CFR 149.510(d)(2)(ii) that, for disputes initiated on or after the later of the effective date of these rules or January 1, 2024, the administrative fee amount would be \$150 per party per dispute, which would remain in effect until changed by notice and comment rulemaking.<sup>74</sup> Under the proposed rules, the Departments would have retained the flexibility to update the administrative fee more or less frequently than annually if the total estimated amount of administrative fees paid or amount of expenditures estimated to be made by the Departments in carrying out the Federal

IDR process changed such that a new administrative fee amount would be required to satisfy the requirement that the total amount of administrative fees paid is estimated to be equal to the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process.

The Departments proposed to set the administrative fee amount by estimating the amount of expenditures made by the Departments in carrying out the Federal IDR process and dividing this amount by the estimated total number of administrative fees paid by the parties. As explained in the preamble to the IDR Fees proposed rules, the Departments estimated the total number of administrative fees paid based on the total volume of closed disputes.

For the purpose of calculating the administrative fee amount in the IDR Fees proposed rules, the Departments projected that approximately 225,000 disputes would be closed annually, resulting in 450,000 administrative fees paid. Additionally, the Departments estimated that the expenditures made by the Departments for carrying out the Federal IDR process in 2024 would be approximately \$70 million.<sup>75</sup> Using this methodology, proposed in paragraphs 26 CFR 54.9816–8(d)(2)(ii), 29 CFR 2590.716–8(d)(2)(ii), and 45 CFR 149.510(d)(2)(ii), the Departments calculated the proposed administrative fee for disputes initiated on or after the effective date of these rules, and continuing until changed by notice and comment rulemaking, by dividing the annual expenditures of approximately \$70 million estimated to be made by the Departments in carrying out the Federal IDR process by 450,000, the estimated annual number of administrative fees to be paid by the disputing parties. This resulted in a proposed administrative fee amount of \$150 per party per dispute.<sup>76</sup>

After considering comments received on the proposals, as discussed further in this preamble section, the Departments are finalizing the policy to set the administrative fee amount in notice and comment rulemaking no more frequently than once per calendar year. The Departments may set the administrative fee less frequently than annually if the Departments estimate

<sup>66</sup> 26 U.S.C. 9816(c)(8)(A).

<sup>67</sup> 29 U.S.C. 1185e(c)(8)(A).

<sup>68</sup> 42 U.S.C. 300gg–111(c)(8)(A).

<sup>69</sup> 26 CFR 54.9816–8T(d)(2)(i), 29 CFR 2590.716–8(d)(2)(i), and 45 CFR 149.510(d)(2)(i).

<sup>70</sup> 26 U.S.C. 9816(c)(8)(B).

<sup>71</sup> 29 U.S.C. 1185e(c)(8)(B).

<sup>72</sup> 42 U.S.C. 300gg–111(c)(8)(B).

<sup>73</sup> 26 CFR 54.9816–8T(d)(2)(ii), 29 CFR 2590.716–8(d)(2)(ii), and 45 CFR 149.510(d)(2)(ii).

<sup>74</sup> As previously mentioned, in the event the effective date of these final rules is after January 1, 2024, the \$50 per party per dispute administrative fee amount in effect for 2023, as provided in the October 2022 guidance, will continue to apply to disputes initiated between January 1, 2024 and the effective date of these rules.

<sup>75</sup> The list of expenditures associated with the estimated \$70 million was provided in the IDR Fees proposed rules at 88 FR 65893.

<sup>76</sup> As described in the IDR Fees proposed rules, the Departments estimated that the proposed administrative fee amount of \$150 per party per dispute would result in an estimated annual collection approximately equal to the estimated annual expenditures of approximately \$70 million. See 88 FR 65888 at 65899.

<sup>65</sup> See 88 FR 75744.

that the total amount of administrative fees paid under the current administrative fee amount would continue to be equal to the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process for the upcoming calendar year.

Additionally, in response to comments received on the proposals, the Departments are modifying the administrative fee methodology used to estimate the number of administrative fees paid. The Departments will use the estimated number of administrative fees paid to certified IDR entities, rather than the estimated number of closed disputes, to estimate the total number of administrative fees paid. In addition, the Departments will not assume, as set forth in the IDR Fees proposed rules, a 25 percent reduction in the volume of disputes as the result of the District Court vacating certain batching requirements in *TMA IV*. The Departments are also revising the expenditures estimated to be made by the Departments in carrying out the Federal IDR process from approximately \$70 million to approximately \$56.6 million to reflect a reduction in the Departments' anticipated assistance with eligibility determinations, as discussed later in this preamble. Collectively, these modifications to the methodology result in a finalized administrative fee amount of \$115 per party per dispute for disputes initiated on or after the effective date of these rules. As the administrative fee methodology in the IDR Operations proposed rules included some of the same elements as the administrative fee methodology in the IDR Fees proposed rules, the Departments will consider whether any modifications made to the administrative fee methodology in these final rules should also be adopted when finalizing the administrative fee amount using the methodology proposed in the IDR Operations proposed rules.

## 2. Summary of Comments Received and Responses to Comments

### a. Establishing the Administrative Fee in Notice and Comment Rulemaking

Many commenters supported the proposal to establish the administrative fee in notice and comment rulemaking. Commenters stated that this transparent process would allow the public to evaluate the administrative fee amount and provide feedback on the feasibility of providers using the Federal IDR process. However, several commenters opposed the proposal to establish the administrative fee amount more or less frequently than annually and stated that

adopting this proposal would introduce uncertainty in the Federal IDR process and would make budgeting more challenging. These commenters requested that the Departments update the administrative fee annually, to balance stability, transparency, and responsiveness, which they stated would mitigate the impact of changes to the administrative fee. One commenter supported the proposal to establish the administrative fee amount more or less frequently than annually, but only if a mid-year change led to a decrease to the administrative fee amount. Commenters also stated that any increases to the administrative fee amount should be on an annual basis with advance notice to interested parties. One of these commenters stated that the administrative fee amount should be set predictably and with at least 90 days' advance notice. Some commenters requested further clarification on the process for proposing and finalizing administrative fee amounts in notice and comment rulemaking.

The Departments agree that one of the goals of establishing the administrative fee amount in notice and comment rulemaking is to foster transparency and allow interested parties to provide feedback on the methodology and process for setting the proposed fee amount. The Departments recognize commenters' concerns about establishing the administrative fee amount more or less frequently than annually, and the Departments are finalizing a policy under which they would establish the administrative fee amount no more frequently than once per calendar year. In addition, the Departments are finalizing as proposed the proposal to change the administrative fee amount less frequently than annually if the expenditures estimated to be made by the Departments in carrying out the Federal IDR process and the estimated total amount of administrative fees paid in the upcoming year are estimated to be equal. If the Departments determine that the estimated total amount of administrative fees paid in a future year at the current administrative fee amount would be less than the expenditures estimated to be made by the Departments in carrying out the Federal IDR process for that year, the Departments would propose to raise the administrative fee amount in notice and comment rulemaking. Alternatively, if the Departments determine that the estimated total amount of administrative fees paid in a future year at the current administrative fee amount would be more than the expenditures estimated to

be made in carrying out the Federal IDR process for that year, the Departments would propose to lower the administrative fee amount in notice and comment rulemaking. Consistent with the statute, the Departments will set the administrative fee such that the estimated total amount of administrative fees paid is equal to the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process.<sup>77</sup>

The Departments also reiterate that using the notice and comment rulemaking process to establish the administrative fee amount will provide interested parties with substantial advance notice of fee changes, so additional advance notice is not needed. As described in the IDR Fees proposed rules, the Departments will provide details on the methodology used to determine the proposed administrative fee amount, and the proposed administrative fee amount, if finalized, would be effective prospectively. Interested parties will be provided with a period to submit public comments on the proposals, and the Departments will consider all comments submitted within the comment period in developing the final rules.

In addition, other commenters raised concerns regarding the amount of the administrative fee changing between any proposed and final rules. One commenter did not support making changes to the administrative fee amount between the proposed and final rules, while another commenter stated that any such changes should be by no more than 10 percent.

The Departments acknowledge these commenters' suggestions but note that the Departments may have more recent data available to estimate the total amount of administrative fees paid or the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process while developing the final rules than they had while developing the IDR Fees proposed rules, and it is reasonable for the Departments to rely on the more recent data in developing the final rules, provided that they use the methodology described in the preamble to the IDR Fees proposed rules or a methodology modified from the preamble to the IDR Fees proposed rules in response to comments. As in these final rules, these circumstances may result in the Departments finalizing a different administrative fee amount than the amount proposed. The finalized

<sup>77</sup> Section 9816(c)(8)(B) of the Code, section 716(c)(8)(B) of ERISA, and section 2799A–1(c)(8)(B) of the PHS Act.



administrative fee amount will differ from the amount proposed, if necessary, to comply with the statutory requirement that the total administrative fees paid are estimated to be equal to the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process.<sup>78</sup>

One commenter was concerned about the ability to comment on the administrative fee amount rather than just the methodology used to calculate the amount and stated that only seeking comment on the methodology could inhibit commenters' ability to accurately express the impact of the proposed fee amount on a disputing party's access to the Federal IDR process.

As previously explained, the Departments are finalizing a policy to establish the administrative fee amount in notice and comment rulemaking no more frequently than once per calendar year and will provide opportunity for comment on any new proposed administrative fee amount, as well as any changes to the methodology used to calculate the administrative fee amount.

#### b. Administrative Fee Methodology—Estimated Total Number of Administrative Fees Paid

Many commenters opposed the Departments' proposed administrative fee methodology for estimating the total number of administrative fees to be paid. Many commenters suggested that estimating the total number of administrative fees paid based on the projected total number of disputes closed would not capture all disputes in which administrative fees are paid. Some commenters were concerned that this methodology could result in an overpayment of administrative fees to the Departments. One of these commenters was concerned that the data from the six-month period in 2023 used to estimate the number of disputes closed would be radically different from 2024 data. Several commenters suggested using other metrics to calculate the estimated total number of administrative fees paid, including the number of disputes initiated, the number of disputes for which a certified IDR entity fee was paid, and the number of disputes for which parties submitted offers. Moreover, some commenters asserted that using disputes closed contradicts the Departments' regulations requiring each party to pay the administrative fee at the time the certified IDR entity is selected and the Departments' guidance permitting certified IDR entities to collect the

administrative fee from parties up to the time of offer submission.<sup>79</sup>

The Departments proposed to use the projected total number of disputes closed to calculate the administrative fee amount because that metric reflected collections under current collections processes,<sup>80</sup> and the Departments were of the view that it was a reliable metric upon which to base the estimated total number of administrative fees to be paid. However, after considering the comments, the Departments agree with the commenters who stated that estimating the total number of administrative fees paid using the projected number of disputes closed would not capture all disputes in which administrative fees are paid because administrative fees may be paid for disputes that have not yet been closed. To capture all disputes in which parties pay administrative fees, the Departments are finalizing the administrative fee amount based on a methodology that estimates the total number of administrative fees paid by projecting Federal IDR portal data on the number of administrative fees paid to certified IDR entities, as explained in the subsequent paragraphs. The number of administrative fees paid to certified IDR entities is currently the best available metric in the Federal IDR portal data to capture all administrative fees parties pay for disputes in any stage of the Federal IDR process.

In the preamble to the IDR Fees proposed rules, the Departments set the administrative fee amount based on the projection that 225,000 disputes would be closed annually. Because both initiating and non-initiating parties to a dispute are required to pay the administrative fee, the Departments estimated in the preamble to the IDR Fees proposed rules that 450,000 administrative fees would be paid annually, or 37,500 per month. As explained above, in setting the administrative fee in these final rules, the Departments are using the total

<sup>79</sup> See 26 CFR 54.9816–8(d)(2)(i), 29 CFR 2590.716–8(d)(2)(i), and 45 CFR 149.510(d)(2)(i); see also section 4.8 of the *Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR Entities*. October 2022. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/federal-independent-dispute-resolution-process-guidance-for-certified-idr-entities.pdf>.

<sup>80</sup> Under current guidance, the administrative fee may be collected by certified IDR entities up until the time the parties submit their offers, and therefore the administrative fee is not collected for all disputes initiated. See, for example, Centers for Medicare & Medicaid Services (March 2023). *Federal Independent Dispute Resolution (IDR) Process Guidance for Certified IDR Entities*. <https://www.cms.gov/files/document/federal-idr-guidance-idr-entities-march-2023.pdf>.

number of administrative fees paid to certified IDR entities for disputes in any stage of the Federal IDR process after certified IDR entity selection. Using the methodology being adopted in these final rules, the Departments estimate that 492,000 administrative fees will be paid annually, or 41,000 administrative fees will be paid per month, by the parties. The Departments estimate the total number of administrative fees paid annually based on the monthly average number of administrative fees paid to certified IDR entities between February 2023 and July 2023. This monthly average was approximately 41,000, and the Departments projected this figure forward by 12 months to estimate that 492,000 administrative fees will be paid annually.

The Departments are using data from the same time period that was used in the IDR Fees proposed rules (February 2023 to July 2023), without updating to newer data. Data from this time period remains the best available data to project future trends due to portal closures and other Federal IDR process changes that began in August 2023 due to the *TMA III* and *TMA IV* opinions and orders. While the Departments considered using data from the most recent six-month period prior to the finalization of this rule (June 2023 to November 2023), they concluded this would inaccurately reflect the monthly average number of administrative fees paid, as various aspects of the Federal IDR process were temporarily suspended from August 4, 2023 to October 6, 2023 for all disputes.<sup>81</sup>

The Departments considered comments providing alternatives for estimating the total number of administrative fees paid in calculating the administrative fee amount. Some commenters wanted the Departments to estimate the total number of administrative fees paid based on the number of disputes initiated. This metric is inaccurate for purposes of calculating the administrative fee amount because the administrative fee may not be collected for all disputes initiated. The obligation for parties to pay the administrative fee attaches at the time of certified IDR entity selection (with guidance permitting certified IDR entities to collect the administrative fee from parties until the time of offer submission). Therefore, if a dispute is withdrawn before selection of the certified IDR entity, there is no obligation for the parties to pay

<sup>81</sup> Of note, batched disputes and single disputes involving air ambulance services also remained suspended after October 6, 2023 and would not be reflected in the most recent data.

<sup>78</sup> *Id.*



administrative fees for that dispute. For this reason, using the total number of disputes initiated to estimate the number of administrative fees to be paid in the administrative fee methodology risks the Departments underfunding the Federal IDR process.<sup>82</sup>

Other commenters requested the Departments to estimate the total number of administrative fees paid based on the number of disputes for which a certified IDR entity fee was paid. Because parties are not required to pay their certified IDR entity fees and administrative fees at the same time, the number of certified IDR entity fees paid would not necessarily reflect the number of administrative fees paid. Therefore, this metric would also be inaccurate for purposes of calculating the administrative fee amount.

Finally, the Departments also considered estimating the total number of administrative fees paid based on the number of disputes for which parties submitted offers. However, the Departments did not believe this metric would accurately reflect the estimated number of administrative fees that would be paid, since parties may pay administrative fees without submitting offers. Thus, the metric could understate the total number of administrative fees paid.

In summary, the Departments are of the view that it is most accurate to use the total number of administrative fees paid to certified IDR entities in the administrative fee methodology rather than the other metrics suggested by commenters in the prior paragraphs, as this metric reflects actual administrative fees that have been paid for disputes in any stage of the Federal IDR process after certified IDR entity selection.<sup>83</sup> Therefore, in recognition of commenters' concerns about a methodology that could underestimate the total number of administrative fees paid in 2024, resulting in an overestimate of the amount of the

administrative fee needed for 2024, the Departments are establishing the administrative fee methodology using the total number of administrative fees paid to certified IDR entities, rather than the total number of closed disputes, to estimate the total number of administrative fees paid in 2024.

The Departments also received comments regarding the Departments' projections of the total number of closed disputes used to estimate the total number of administrative fees paid. Several commenters suggested that the Departments' estimate of 225,000 closed disputes is too low. A few commenters suggested that the Departments are underestimating utilization of the Federal IDR process and recommended that the Departments analyze the available data from States implementing similar policies before the No Surprises Act.

In the IDR Fees proposed rules, the Departments estimated that 225,000 disputes would be closed annually, and because both the initiating and non-initiating parties to a dispute are required to pay the administrative fee, 450,000 administrative fees would be paid annually. The Departments now estimate that 492,000 administrative fees will be paid to certified IDR entities in the year, as described earlier in this preamble section. The Departments continue to be of the view that Federal IDR process data is the best available data to project trends in the Federal IDR process, especially because regulations and volume differ in State IDR processes. As mentioned in the IDR Fees proposed rules, the Departments initially anticipated 17,333 disputes involving non-air ambulance services would be initiated during the first year of implementation of the Federal IDR process. The Departments developed this estimate based on the experience of New York State. However, the use of State data resulted in the Departments underestimating utilization of the Federal IDR process, as nearly 335,000 disputes were initiated in the Federal IDR process between April 2022 and March 2023.<sup>84</sup> As demonstrated by this result, past data from State processes has limited applicability in predicting future use of the Federal IDR process. For this reason, the Departments are of the view that it is better to use Federal IDR process data rather than State data to estimate the total number of administrative fees paid.

In addition, several commenters disagreed with the Departments' assumption of a 25 percent reduction in the volume of disputes in estimating the total number of administrative fees paid to account for the impact of *TMA IV*'s vacatur of batching regulations and guidance, or asked for more detail on how the projected 25 percent reduction factor was determined, including the details on how the batching of claims will be treated in the future. One commenter noted that the vacatur of the \$350 administrative fee amount and batching regulations as a result of *TMA IV* allows many additional claims to become economically viable, so the Departments should expect dispute volume to increase. Another commenter stated that the Departments cannot know with certainty that the *TMA IV* opinion and order will decrease the number of disputes. This commenter also asserted that *TMA IV* did not affect the batching criteria that serve as the largest obstacle for emergency medicine, and therefore there will not be large batches in emergency medicine, which the commenter noted comprised over 70 percent of disputes reflected in the Partial Report on the Independent Dispute Resolution (IDR) Process October 1–December 31, 2022.<sup>85</sup> Moreover, a few commenters suggested that the *TMA III* opinion and order will increase dispute volume as providers will continue to see low QPAs from plans and issuers and will rely on the Federal IDR process for appropriate payment. One commenter agreed with the Departments' assumption that the *TMA IV* opinion and order will decrease the volume of disputes but disagreed with the Departments' rationale that the increased number of line items will take more time to close. This commenter expected that providers batching claims rather than submitting claims individually would increase efficiencies in the Federal IDR process.

After reviewing the comments, the Departments have reconsidered the assumption that the number of disputes will decrease by 25 percent as a result of *TMA IV*'s vacatur of batching regulations and guidance. Therefore, the Departments are not finalizing the projected 25 percent reduction in the estimated total number of administrative fees paid.

The Departments recognize that certain batching criteria remain in place,

<sup>82</sup> In the IDR Operations proposed rules, the Departments proposed to use the total volume of disputes projected to be initiated because the proposed operational changes in those rules, if finalized, would result in the Departments' collection of administrative fees closer to a dispute's date of initiation, and therefore, it may be appropriate to estimate the total volume of administrative fees paid using the total volume of disputes initiated. 88 FR 75793.

<sup>83</sup> As explained in these final rules, under current processes, the total volume of administrative fees paid to certified IDR entities is the best metric to use in the administrative fee methodology to align with statute requiring the Departments to estimate the total number of administrative fees paid. As operations of the Federal IDR process improve over time, the Departments will consider changes to the methodology to best estimate the total number of administrative fees paid.

<sup>84</sup> Centers for Medicare & Medicaid Services (April 27, 2023). *Federal Independent Dispute Resolution Process—Status Update*. <https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf>.

<sup>85</sup> U.S. Department of Health and Human Services, U.S. Department of Labor, U.S. Department of the Treasury. *Partial Report on the Independent Dispute Resolution (IDR) Process October 1–December 31, 2022*. <https://www.cms.gov/files/document/partial-report-idr-process-octoberdecember-2022.pdf>.

such as criteria that impact the batching of emergency medicine claims, and items and services included in such claims will have to be submitted as separate disputes if they do not comply with the applicable batching criteria.<sup>86</sup> Moreover, because the Departments are finalizing the administrative fee amount based on a methodology that estimates the total number of administrative fees paid based on the total number of administrative fees paid to certified IDR entities, rather than the total number of closed disputes, the methodology no longer requires the Departments to make an assumption on whether batched disputes will take more time to close after the vacatur of the batching regulations as a result of *TMA IV*. In addition, the Departments do not have data available to support commenters' assertion that *TMA III* will lead more providers to rely on the Federal IDR process for appropriate claims payment. Plans and issuers are required to calculate QPAs using a good faith, reasonable interpretation of the applicable statutes and regulations that remain in effect after the *TMA III* opinion and order.<sup>87</sup> Furthermore, in their experience operating the Federal IDR process, the Departments have not seen a clear or quantifiable relationship between changes in policy and changes in the number of disputes initiated. The Departments are of the view that the historical data from February 2023 to July 2023 is the best available data at this time to project utilization of the Federal IDR process in 2024, and the Departments are therefore finalizing the administrative fee amount based on a methodology that does not include a 25 percent reduction in the volume of disputes.

#### c. Administrative Fee Methodology—Estimated Expenditures

The Departments also received comments related to their estimated expenditures for purposes of calculating the administrative fee amount. Several commenters suggested that the Departments should disclose more data supporting the estimated costs to carry out the Federal IDR process in the administrative fee methodology to provide the public with an opportunity to comment. Some of these commenters

asserted that the IDR Fees proposed rules did not provide enough detail on the estimated expenditures to allow interested parties to provide meaningful comment on the proposed administrative fee amount. One commenter urged the Departments to establish a regular process for detailing the Departments' data on the administrative fee, including an annual disclosure statement with a balance sheet, to promote transparency and predictability. A few commenters disputed the Departments' reference that Freedom of Information Act (FOIA) regulations prevent the Departments from providing detail on certain estimated expenditure amounts. These commenters stated that without this transparency, interested parties were not afforded an opportunity to meaningfully comment on the proposals related to the administrative fee amount and methodology inputs.

The Departments are finalizing the administrative fee amount based on a methodology that divides the "estimated," rather than "projected," expenditures to carry out the Federal IDR process by the estimated total number of administrative fees to be paid in the year. The use of "estimated" rather than "projected" expenditures is to ensure the terminology used to describe the methodology is consistent with that of the statutory text.<sup>88</sup> To calculate the estimated expenditures to carry out the Federal IDR process, the Departments included the Federal resources needed to carry out the Federal IDR process, such as future personnel and contract costs. The preamble to the IDR Fees proposed rules provided an overview of the future contract costs and Federal resources included in the estimated expenditures and explained that the estimated expenditures to carry out the Federal IDR process in 2024 were approximately \$70 million. The Departments disagree with commenters that the Departments did not provide sufficient information to allow meaningful comment. In particular, in the preamble to the IDR Fees proposed rules, the Departments provided details on the types of costs that are included in the estimated expenditures.<sup>89</sup>

While the Departments described the contract costs and Federal resources associated with estimated expenditures to carry out the Federal IDR process in the preamble to the IDR Fees proposed rules, in response to comments

requesting additional specifics on the estimated expenditures and in an effort to promote transparency, the Departments are providing further detail on costs included in the total estimated expenditures in these final rules within the bounds of the Departments' ability to disclose these amounts. To avoid releasing sensitive contract information, the Departments are breaking down the costs, which include the future contract and Federal personnel costs, by category of expenditure, and providing approximate cost estimates for carrying out the following categories of Federal IDR process activities:<sup>90</sup>

- Maintaining, operating, and improving the Federal IDR portal, certifying IDR entities, and collecting data from certified IDR entities (approximately \$26,360,000);
- Conducting program integrity activities, such as certain QPA audits (as further described subsequently in this preamble) and IDR decision audits, and receiving and investigating Federal IDR process-related complaints (approximately \$13,060,000, of which QPA audits resulting from complaints filed by providers, facilities, or providers of air ambulance services comprise approximately \$5,000,000);
- Providing outreach to parties and technical assistance to certified IDR entities, including assisting with eligibility determinations when the volume of disputes submitted exceeds the capacity of certified IDR entities to perform those determinations (approximately \$11,630,000, of which assisting with eligibility determinations comprises approximately \$10,000,000);<sup>91</sup> and
- Collecting administrative fees (approximately \$5,530,000), which includes costs to invoice certified IDR entities for administrative fees collected, provide the system infrastructure for certified IDR entities to record and remit administrative fees collected, track data on fees collected and make continuous improvements to the collections process and invoicing systems.

<sup>90</sup> As discussed further later in this preamble section, the Departments have reconsidered costs associated with total estimated expenditures of carrying out the Federal IDR process and are revising the total estimated expenditures for 2024 from approximately \$70 million to approximately \$56.6 million. Additionally, certain expenses apply across multiple categories that were included in the IDR Fees proposed rules. This revised combination of categories better provides a meaningful cost estimate of these activities.

<sup>91</sup> Centers for Medicare & Medicaid Services (November 21, 2022). *Notice of the Federal Independent Dispute Resolution (IDR) Team Technical Assistance to Certified Independent Dispute Resolution Entities (IDREs) in the Dispute Eligibility Determination Process*. <https://www.cms.gov/files/document/idre-eligibility-support-guidance-11212022-final-updated.pdf>.

<sup>86</sup> U.S. Department of Health and Human Services, U.S. Department of Labor, U.S. Department of Treasury, Office of Personnel Management (October 6, 2023). *FAQs about Consolidated Appropriations Act, 2021 Implementation Part 62*. <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/aca-part-62.pdf> and <https://www.cms.gov/files/document/faqs-part-62.pdf>.

<sup>87</sup> *Id.*

<sup>88</sup> Section 9816(c)(8)(B) of the Code, section 716(c)(8)(B) of ERISA, and section 2799A-1(c)(8)(B) of the PHS Act.

<sup>89</sup> 88 FR 65893.

The Departments are publishing summary-level estimated budget information and have provided meaningful data for public input for the purposes of calculating the administrative fee amount. The Departments intend to continue to provide data on the Federal IDR process to promote transparency and predictability in the administrative fee amount, including publishing quarterly public reports with the Departments' expenditures and administrative fee collections.<sup>92</sup>

In response to commenters' concerns regarding the Departments' reference to the applicability of FOIA exemptions to information shared during the rulemaking process, the Departments clarify that they will disclose information in response to any requests in accordance with the FOIA and accompanying regulations. However, the Departments are not publishing specific future contract estimates in this rule in response to commenters' requests for more detail on estimated expenditures of Federal IDR process activities and the data underlying those estimates because publishing those contract estimates could undermine future contract procurements. For example, if the Departments were to publish the projected future cost of the contracts used to maintain the Federal IDR portal, the Federal Government would be meaningfully disadvantaged in future contract negotiations related to the Federal IDR portal, as bidders would know how much the Departments anticipate such a future contract being worth. Although current contract awards are published and publicly available,<sup>93</sup> these award amounts do not necessarily reflect the future value of the contract, as there may be future changes in policy and operations and the scope of work.

The Departments are of the view that interested parties had sufficient information to meaningfully comment on the IDR Fees proposed rules. For example, commenters provided valuable information in their comments regarding how the Departments should estimate the total number of

administrative fees paid. Based on these comments, the Departments modified the methodology accordingly. Similarly, the Departments provided detailed information in the IDR Fees proposed rules on their calculation of the estimated expenditures to carry out the Federal IDR process. Specifically, the Departments detailed the types of activities included in estimating the annual expenditures of approximately \$70 million and received comments on these activities. After considering comments received on these details of the administrative fee methodology, the Departments have revised this estimate of annual expenditures down to approximately \$56.6 million, as explained in later paragraphs.

In addition, many commenters raised concerns about the inclusion of certain types of expenses in the administrative fee methodology. Several commenters recommended excluding all or some of the QPA audit costs given that the QPA also serves a purpose outside of the Federal IDR process in calculating patient cost sharing. Some commenters asked the Departments to disclose their total expenditures on QPA audits and the portion proposed to be funded by administrative fees compared to other sources.

As previously mentioned, the Departments are required to include estimated expenditures to carry out the Federal IDR process, which include contract costs and Federal resources, in calculating the administrative fee amount. Accordingly, the Departments disagree with commenters who suggested that QPA audit costs should not be included in the calculation of the administrative fee amount and are adopting an administrative fee methodology that includes certain QPA audit costs in the estimated expenditures. For any dispute in the Federal IDR process, a plan or issuer would have been required to disclose the QPA to the provider along with the initial payment or notice of denial of payment for items and services, and disputing parties must include the QPA for items and services when initiating a dispute. Certified IDR entities are required to consider the QPA when selecting between the offers submitted by disputing parties when determining the total out-of-network payment rate for items and services subject to the Federal IDR process.<sup>94</sup>

Furthermore, it is the responsibility of the Departments (or the applicable State authorities), rather than the provider,

facility, provider of air ambulance services, or the certified IDR entity, to monitor plan and issuer compliance with the QPA requirements.<sup>95</sup> To date, the Departments have only conducted audits as part of investigations of complaints, and anticipate continuing to conduct these risk-based audits in the future, though the No Surprises Act permits the Departments to conduct random and risk-based audits.<sup>96</sup> Given the role of the QPA in the Federal IDR process and the direct impact on providers, performing audits on plans and issuers in response to allegations that the plan's or issuer's QPAs are inaccurate is necessary to carry out the Federal IDR process and promotes the integrity of and confidence in the Federal IDR process.

Moreover, addressing concerns about inaccurately calculated QPAs helps to ensure plans and issuers provide correctly calculated QPAs when they participate in the Federal IDR process. For example, in the absence of QPA audits to investigate complaints from providers, facilities, and providers of air ambulance services that one or more of a plan's or issuer's QPAs are inaccurate, plan and issuer compliance with QPA requirements would go unchecked.<sup>97</sup> Certified IDR entities must consider the relevant QPA in making each payment determination under the No Surprises Act,<sup>98</sup> and unchecked QPAs would significantly threaten the integrity of QPAs and the payment determinations made by certified IDR entities. These audits help to increase transparency into the QPA calculation methodology and encourage compliance among plans and issuers. Accordingly, QPA audits are an integral part of the Federal IDR process, the costs of which are reasonably included in the calculation of the administrative fee amount.

<sup>95</sup> Section 9816(a)(2)(A)(i) of the Code, section 716(a)(2)(A) of ERISA, and section 2799A–1(a)(2)(A)(i) of the PHS Act. *See also* 86 FR 36899. However, a provider or facility may always assert to the certified IDR entity that additional information points in favor of the selection of its offer as the out-of-network payment amount, even where that offer is for a payment amount that is different from the QPA. 87 FR 52627.

<sup>96</sup> Section 9816(a)(2)(A)(ii) of the Code, and section 2799A–1(a)(2)(A)(ii) of the PHS Act. The July 2021 interim final rules describe the enforcement responsibilities for each Department and OPM. 86 FR 36899 (July 13, 2021). <https://www.federalregister.gov/documents/2021/07/13/2021-14382/requirements-related-to-surprise-billing-part-i>.

<sup>97</sup> The accuracy of a plan's or issuer's QPA (or QPA methodology) may not be reviewed within a payment determination under the Federal IDR process. *See* 86 FR 55996.

<sup>98</sup> Section 9816(c)(5)(C)(i)(I) of the Code, section 716(c)(5)(C)(i)(I) of ERISA, and section 2799A–1(c)(5)(C)(i)(I) of the PHS Act.

<sup>92</sup> *See, e.g.*, U.S. Department of Health and Human Services, U.S. Department of Labor, U.S. Department of the Treasury, *Initial Report on the Independent Dispute Resolution (IDR) Process April 15–September 30, 2022*, <https://www.cms.gov/files/document/initial-report-idr-april-15-september-30-2022.pdf>. U.S. Department of Health and Human Services, U.S. Department of Labor, U.S. Department of the Treasury, *Partial Report on the Independent Dispute Resolution (IDR) Process October 1–December 31, 2022*, <https://www.cms.gov/files/document/partial-report-idr-process-october-december-2022.pdf>.

<sup>93</sup> Available at [www.sam.gov](http://www.sam.gov).

<sup>94</sup> Section 9816(c)(5)(C)(i)(I) of the Code, section 716(c)(5)(C)(i)(I) of ERISA, and section 2799A–1(c)(5)(C)(i)(I) of the PHS Act.

In estimating the expenditures to carry out the Federal IDR process, the Departments are including estimated costs only for certain QPA audits that the Departments anticipate incurring to investigate complaints regarding inaccurate QPAs made by providers, facilities, and providers of air ambulance services under the Federal IDR process. The Departments are not including the costs of QPA audits conducted: (1) in connection with Department of Labor, OPM, or Department of the Treasury investigations; (2) randomly; or (3) in response to complaints from consumers, as not all of these audits are necessarily related to the Federal IDR process. The Departments are of the view that only the costs related to QPA audits conducted in response to complaints from entities that are potential parties to a payment determination are sufficiently related to the Federal IDR process to justify their inclusion in the administrative fee calculation. For example, consumers who complain that a plan or issuer inaccurately calculated their cost sharing based on an erroneously calculated QPA will not be involved in the Federal IDR process, and therefore the costs of such audits are appropriately excluded from those costs supported by administrative fees paid by parties to the Federal IDR process. Because HHS is primarily responsible for the implementation of the Federal IDR process, the Departments view similarly random QPA audits that may be conducted by the Departments, as well as any QPA audits in connection with Department of Labor, OPM, and Department of the Treasury investigations.

The costs of HHS conducting QPA audits for complaints that a plan's or issuer's QPAs are inaccurate are estimated to be approximately \$5,000,000 in 2024. As plans and issuers improve their compliance in calculating QPAs correctly, the Departments anticipate that the costs of conducting these audits will decrease, which would be reflected in the estimated expenditures used to determine future administrative fee amounts.

Several commenters also disagreed with including costs associated with assisting with eligibility reviews in the estimated expenditures to carry out the Federal IDR process. A few of these commenters noted that certified IDR entities are responsible for conducting eligibility reviews and therefore certified IDR entity fees should cover this cost. Some commenters asserted that such costs should be recovered through the non-prevailing party's

certified IDR entity fee, as the eligibility determination is part of the payment determination. One of these commenters expressed concern that including this expense would incentivize certified IDR entities to understaff as HHS would intervene to address a staffing shortage.

The Departments disagree that the costs of assisting with eligibility determinations should be excluded from estimated expenditures. Certified IDR entities voluntarily participate in the Federal IDR process and set their certified IDR entity fees within ranges established by the Departments to ensure they remain financially viable and that such fees can cover their operating expenses to participate in the Federal IDR process, which include the costs incurred in determining the eligibility of items and services for the Federal IDR process. While certified IDR entities are responsible for making eligibility determinations, and therefore incur costs associated with this activity, the Departments have also incurred costs since November 2022 to assist certified IDR entities in making these determinations by performing research and outreach on disputes pending eligibility determinations, including identifying and obtaining information necessary for certified IDR entities to make eligibility determinations, and will continue to incur such costs in 2024.<sup>99</sup> The Departments disagree with the commenter that stated that the Departments' assistance would incentivize certified IDR entities to understaff. Certified IDR entities could not have reasonably predicted the amount of personnel they would need to make eligibility determinations within the required timeframe given the extremely high volume of disputes. Moreover, it has been difficult for certified IDR entities to make staffing adjustments in response to utilization of the Federal IDR process due to the repeated temporary pauses in the Federal IDR portal resulting from litigation matters and changes in operations.

When the Departments first developed the Federal IDR process and the rules and guidance establishing how certified IDR entities were to calculate their fees for the scope of work they were expected to perform, the Departments and the certified IDR entities did not anticipate the significant

difficulty and costs involved in determining eligibility for the Federal IDR process. After six months of operating the Federal IDR process and receiving feedback from disputing parties and certified IDR entities, the Departments determined that it was necessary to assist certified IDR entities with determining eligibility through performing research and outreach on disputes pending eligibility determinations, including identifying and obtaining information necessary to make an eligibility determination.<sup>100</sup> The Departments determined that this course of action was necessary when it became clear that eligibility determinations were taking significantly longer than the Departments had anticipated.

In the IDR Operations proposed rules, the Departments proposed several policies aimed at improving communication between the parties that would make eligibility determinations less burdensome for certified IDR entities and speed up the Federal IDR process, as well as allow the Departments to make eligibility determinations under extenuating circumstances.<sup>101</sup> However, these policies, if finalized, will take time to implement. In the interim, the Departments are working to balance feedback from interested parties asking the Departments to increase the efficiency of the Federal IDR process and decrease the backlog of disputes with other feedback asking the Departments to minimize expenditures and avoid increases to the administrative fee. The Departments have also received comments urging them to shorten the time it takes for payment determinations to be reached. The Departments continue to believe that some level of assistance is necessary to address the high volume of disputes submitted and the backlog of disputes, due in part to the closing and reopening of the Federal IDR process to make necessary systems updates in light of the *TMA III* and *TMA IV* opinion and orders.

However, after reviewing comments, the Departments have reconsidered the amount of estimated costs associated with pre-eligibility reviews that should be included in the estimated expenditures to carry out the Federal IDR process in calendar year 2024. In estimating the expenditures of approximately \$70 million in the IDR

<sup>99</sup> Centers for Medicare & Medicaid Services (November 21, 2022). *Notice of the Federal Independent Dispute Resolution (IDR) Team Technical Assistance to Certified Independent Dispute Resolution Entities (IDREs) in the Dispute Eligibility Determination Process*. <https://www.cms.gov/files/document/idre-eligibility-support-guidance-11212022-final-updated.pdf>.

<sup>100</sup> The Departments are providing technical assistance regarding eligibility but are not making eligibility determinations, as, under current regulations, only certified IDR entities may make eligibility determinations. *Id.*

<sup>101</sup> 88 FR 75744.

Fees proposed rules, the Departments included an increase in costs to reflect the Departments taking on a greater role in assisting with eligibility determinations to improve the efficiency of the Federal IDR process.<sup>102</sup> Based on comments received urging the Departments to avoid increasing the administrative fee, the Departments will not take on a greater role in broadly assisting certified IDR entities with eligibility determinations at this time. Instead, the Departments will limit their assistance with eligibility determinations to more complex disputes, such as disputes where there is missing information to determine Federal versus State jurisdictions in a State with a specified State law. This approach will ensure efficient use of the Departments' resources by leveraging the Departments' assistance and expertise in handling pre-eligibility reviews for disputes that certified IDR entities may need to spend more time on, such as disputes for which information was limited due to the systems in place when those disputes were initiated, and will allow certified IDR entities to focus on moving disputes through the Federal IDR process. Furthermore, this will allow the Departments to keep the costs of assisting with eligibility determinations lower in 2024 such that the expenditures estimated to be made by the Departments to carry out the Federal IDR process are now estimated to be approximately \$56.6 million in 2024. The total estimated expenditures in the IDR Fees proposed rules included approximately \$20 million for the Departments to assist with eligibility determinations via conducting research and outreach. The estimated cost of assisting with eligibility determinations in 2024, as used to calculate the administrative fee as finalized, is approximately \$10 million.

Furthermore, the Departments do not anticipate that the decision to focus their assistance with pre-eligibility reviews on more complex disputes and the revised administrative fee amount finalized in these rules will impact the fees certified IDR entities choose to

charge. Given the backlog of disputes, utilization of the Federal IDR process strains the current capacity of certified IDR entities to make timely determinations. While the Departments' assistance with eligibility determinations is currently helping to alleviate the backlog of disputes, certified IDR entities' operating expenses are not expected to decrease as a result. If the Departments are able to decrease their assistance with eligibility determinations, the costs of pre-eligibility reviews would decrease, which would be reflected in the estimated expenditures used to determine future administrative fee amounts.

In addition, some commenters disagreed with including the costs of investigating complaints of non-compliance in the administrative fee methodology. Commenters asked for clarity in the "investigating relevant complaints" expense and asserted that "relevant" complaints beyond the Federal IDR process would be inappropriate to include in the calculation of the administrative fee amount. A few of these commenters suggested that the party found to be non-compliant should bear the costs of the investigation and asked the Departments to publicly report summary data on these investigations and the costs covered by non-compliant parties compared to those covered by administrative fees. One commenter suggested that the investigation of complaints related to violations of the No Surprises Act should be funded by a congressional appropriation as these are largely unrelated to the Federal IDR process.

The Departments clarify that the complaints costs included in the estimated expenditures in the administrative fee methodology only include costs associated with receiving and investigating Federal IDR process-related complaints. For example, such costs include investigating complaints within the Departments' jurisdiction regarding the failure of a non-prevailing party to pay the payment determination amount to the prevailing party within 30 days of the certified IDR entity's payment determination as required by the No Surprises Act.<sup>103</sup> Complaints costs do not include costs for complaints that are not related to the Federal IDR process, such as those related to the QPA for patient cost sharing. Therefore, the Departments are of the view that those costs are

appropriate to include in the administrative fee methodology and are necessary to ensure compliance with the Federal IDR process.<sup>104</sup>

Many commenters suggested that the Departments consider other funding sources besides the administrative fee to fund expenditures. Several commenters suggested that implementing penalties could help fund expenditures, including penalties for submitting ineligible disputes, failing to comply with disclosure obligations, or delaying the Federal IDR process. Some commenters suggested the CAA's \$500 million appropriation to implement the No Surprises Act should cover at least a portion of the Departments' estimated expenditures. One commenter asked for confirmation that the implementation appropriation has been exhausted fully and suggested requesting additional funds from Congress in upcoming budget requests to support the funding of the Departments' ongoing implementation. Another commenter asserted that the administrative fee methodology set forth in the IDR Fees proposed rules did not take into account any appropriations funding.

As required by the No Surprises Act,<sup>105</sup> both parties to a dispute must pay an administrative fee for participating in the Federal IDR process. By statute, the administrative fee amount must be calculated such that the total amount of fees paid for a year is estimated to be equal to the amount of expenditures estimated to be made by the Departments for such year in carrying out the Federal IDR process. While the CAA appropriated \$500 million to remain available until expended through 2024 for preparing regulations, guidance, and reports, collecting data, conducting audits and enforcement activities,<sup>106</sup> and

<sup>102</sup> While there is an implementation appropriation, the initial appropriation of \$500 million in the CAA is finite and only remains available until expended through 2024. Moreover, the Departments note that additional mandatory funding for the Federal IDR process has not been appropriated beyond the initial \$500 million made available in the CAA. However, the Departments cannot rely on budget requests or on appropriations enacted by Congress when calculating this fee. The statute requires the fee to be set at an amount such that the total amount of fees paid is estimated to be equal to the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process.

<sup>103</sup> Section 9816(c)(6) of the Code, section 716(c)(6) of ERISA, and section 2799A-1(c)(6) of the PHS Act.

<sup>104</sup> While there is an implementation appropriation, the initial appropriation of \$500 million in the CAA is finite and only remains available until expended through 2024. Moreover, the Departments note that additional mandatory funding for the Federal IDR process has not been appropriated beyond the initial \$500 million made available in the CAA. The Departments are unable to appropriate this funding themselves, although they have made numerous requests to Congress for additional funding, and therefore this is not a reliable source of Federal IDR process funding.

<sup>105</sup> Section 9816(c)(8)(A) of the Code, section 716(c)(8)(A) of ERISA, and section 2799A-1(c)(8)(A) of the PHS Act.

<sup>106</sup> As previously explained in the preamble to these final rules, the Departments may conduct random or risk-based QPA audits. The Departments consider it appropriate to include some of the costs of conducting risk-based QPA audits resulting from complaints filed by providers, facilities, or providers of air ambulance services alleging that the QPA was inaccurate as expenditures made in carrying out the Federal IDR process, and therefore include the costs of conducting these audits in

establishing and initially implementing the No Surprises Act and Title II Transparency provisions through calendar year 2024, this finite appropriation is not solely for the Federal IDR process. Additionally, while the Fiscal Year 2024 President's budget included another \$500 million appropriation request for the continued implementation of the No Surprises Act and Title II Transparency provisions, the administrative fee amount finalized in these rules must still be consistent with the statutory requirement to set the administrative fee amount such that the total amount of administrative fees paid is estimated to be equal to the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process. As a result, when calculating this fee, the Departments cannot rely on budget requests or on appropriations enacted by Congress.

In addition, commenters urged the Departments to consider strategies to decrease utilization of the Federal IDR process, decrease administrative burden, increase the efficiency of the Federal IDR process, and ultimately reduce the cost of administering the Federal IDR process. Examples of commenters' suggestions include enforcing disclosure requirements, requiring plans and issuers to include remittance advance remark codes (RARC)s at the time of initial claim determination, easing batching requirements, disincentivizing bad faith conduct, making improvements to the Federal IDR portal, and implementing a required initial payment amount for out-of-network emergency services. Several commenters suggested that the volume of ineligible disputes and the cost of conducting eligibility reviews would be reduced or eliminated if the Departments enforced disclosure requirements or required plans and issuers to provide adequate information for providers to determine whether a claim is eligible for the Federal IDR process. One commenter suggested that plans and issuers should cover the cost of eligibility reviews when they fail to inform the provider of eligibility for the Federal IDR process. Another commenter suggested that the cost of eligibility reviews should be assessed to the party that challenges eligibility as this cost would be avoidable if the plan

or issuer provided sufficient information. One commenter suggested that the Departments could reduce the administrative burden of the Federal IDR process by contracting with an established claims processing clearinghouse that currently possesses the capabilities to perform real-time eligibility determinations to create an in-portal eligibility validation process.

The Departments continue to consider improvements to the Federal IDR process and recently published the IDR Operations proposed rules,<sup>107</sup> which include policies aimed at reducing the volume of ineligible disputes, establishing additional disclosure requirements (such as requiring plans and issuers to use approved claim adjustment reason codes (CARCs) and RARC)s, incentivizing good faith conduct with respect to open negotiation and exchange of information, and otherwise improving the Federal IDR process. Overall, these policies would, if finalized, support efficiency in Federal IDR process operations and reduce the cost of administering the Federal IDR process in the future.

Recognizing that the cost of certifying IDR entities is included in the administrative fee methodology, one commenter sought clarity on how the methodology considers efficiencies gained from certifying more IDR entities to make payment determinations and therefore reduce the backlog.

The Departments note that the benefits of certifying new IDR entities will be achieved over time, as new certified IDR entities acclimate to the process and increase the speed at which they move disputes through the Federal IDR process. As efficiencies in the Federal IDR process are adopted over time, the expenditures required to carry out the Federal IDR process could decrease, exerting downwards pressure on the administrative fee amount. If any of these situations results in changes to the data used to calculate the administrative fee amount, the Departments intend to take these changes into consideration when establishing the administrative fee amount in the future.

#### d. Administrative Fee Methodology—Other Comments

The Departments sought comments on whether, when calculating the administrative fee amount in future years, they should apply an inflationary adjustment, such as the consumer price index for all urban consumers (CPI-U), to the amount of estimated expenditures

to be made by the Departments in carrying out the Federal IDR process. A few commenters supported using an inflationary adjustment, such as the CPI-U, to adjust the administrative fee amount in future years. Other commenters opposed this approach, stating that it would not necessarily correlate with the Departments' expenditures to operate the Federal IDR process and may not align with the established methodology of dividing the Departments' estimated expenditures by the estimated total number of administrative fees to be paid. Another commenter stated that this proposal would be unnecessary if the Departments finalize the proposal to establish the administrative fee amount more or less frequently than annually. Finally, another commenter asked the Departments to revisit this proposal when data are more predictable after implementing planned improvements to the Federal IDR process.

Upon consideration of the comments, the Departments are not finalizing the use of an inflationary adjustment, such as the CPI-U, to adjust the administrative fee amount in future years. The Departments agree with commenters that the CPI-U may not correlate with projected increases in the Departments' estimated expenditures to carry out the Federal IDR process and therefore using it could be inconsistent with the statute.

Several commenters urged the Departments to improve the Federal IDR process before increasing the administrative fee amount by decreasing the backlog, enforcing timely payment, and holding all parties accountable to the regulatory requirements. Some commenters recommended maintaining the current administrative fee amount until there is stability in the Federal IDR process and more data are available to accurately forecast long-term costs. A few commenters suggested that the Departments modify the administrative fee amount in future years to make up for any shortfall or surplus created by the finalized administrative fee amount.

As previously mentioned, the Departments continue to consider improvements to the Federal IDR process; however, implementing these improvements would increase the costs of carrying out the Federal IDR process in the short term and would take time to operationalize. As previously mentioned, the Departments proposed policies in the IDR Operations proposed rules aimed to improve the overall efficiency and operations of the Federal

<sup>107</sup> estimating the expenditures made by the Departments in carrying out the Federal IDR process. Other audit costs, such as the QPA audits conducted in connection with Department of Labor, OPM, or Department of Treasury investigations; audits conducted randomly; or audits conducted in response to complaints from consumers regarding QPAs may be funded using other appropriations, as applicable.

IDR process.<sup>108</sup> The Departments were unable to propose those policies in the IDR Fees proposed rules because they are much more comprehensive than the fee-related policies proposed in the IDR Fees proposed rules and would require more time to develop and implement, if finalized. There is an urgency to publish these final rules due to the need to sufficiently fund the Federal IDR process in 2024, because, as explained above, the current \$50 administrative fee amount is insufficient to provide total administrative fees that are estimated to be equal to the expenditures estimated to be made by the Departments in carrying out the Federal IDR process, as required by the No Surprises Act.<sup>109</sup>

#### e. Administrative Fee Amount and Impact

Many commenters opposed the proposed \$150 per party per dispute administrative fee amount and stated that it would make the Federal IDR process cost-prohibitive to pursue for many providers, especially small providers, rural providers, independent practices, and certain medical specialties, such as psychiatry, emergency medicine, radiology, and anesthesiology. Some commenters requested that the Departments analyze how the proposed administrative fee amount would be cost-prohibitive for providers and would deter and limit dispute resolution for small providers. A few commenters asserted that the administrative fee amount would unfairly favor plans and issuers over providers in the Federal IDR process. One commenter recommended against using a methodology to calculate the administrative fee amount that did not consider the increased financial burdens on providers compared to plans and issuers. Another commenter stated that the proposed administrative fee amount prioritizes the interest of certified IDR entities and the Departments in covering their costs at the expense of parties' access to the Federal IDR process.

Similarly, some commenters stressed that it is important to keep the administrative fee amount low to prevent the administrative fee from serving as a *de facto* barrier to the Federal IDR process. These commenters asserted that such a *de facto* barrier would not align with congressional intent, as Congress decided against adding a dollar-value threshold to the No Surprises Act despite considering

this while developing the legislation. Several commenters raised concerns that reducing access to the Federal IDR process would reduce providers' reimbursements for out-of-network services, as it would not be cost-effective to dispute certain payment amounts in the Federal IDR process. Some commenters asserted that a cost-prohibitive administrative fee amount would reduce incentives for plans and issuers to negotiate fair in-network contracts or, in some cases, renew contracts, forcing providers out of networks.

A few commenters suggested that patients would also be impacted by the increased administrative fee amount, either through plans and issuers narrowing provider networks or increasing premiums and cost-sharing amounts, or providers passing on costs to patients or going out of business. However, several commenters noted that the proposed fee amount was an improvement from the previous \$350 amount.

For reasons described throughout this preamble, the Departments are finalizing the administrative fee amount for disputes initiated on or after the effective date of these rules as \$115 per party per dispute. This change in the administrative fee amount between the proposed and final rules reflects modifications to the estimated expenditures and to the administrative fee methodology described elsewhere in this preamble.

While the Departments are statutorily required to set the administrative fee amount such that the total amount of administrative fees paid is estimated to be equal to the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process, the Departments acknowledge the concerns of commenters related to accessibility and affordability of the Federal IDR process and the impact of the proposed administrative fee amount on the parties and patients. In the Departments' effort to balance their statutory obligations with the priority of ensuring equitable access for parties to engage in the Federal IDR process, the Departments proposed in the IDR Operations proposed rules to reduce the administrative fee amount in certain circumstances. In the IDR Operations proposed rules, the Departments proposed to reduce the administrative fee amount to \$75 (50 percent of the full administrative fee amount proposed in those proposed rules) for both parties when the highest offer by either party in open negotiation was less than the full administrative fee amount (\$150 as

proposed in those proposed rules)<sup>110</sup> and to \$30 (20 percent of the full administrative fee amount proposed in those proposed rules) for non-initiating parties in ineligible disputes.<sup>111</sup> The Departments also proposed in the IDR Operations proposed rules to revise the requirements for batching qualified IDR items and services together into a single Federal IDR process dispute.<sup>112</sup> The Departments anticipate that these proposals would make the Federal IDR process more accessible for all parties, but especially the parties for whom commenters expressed concerns, such as small and rural providers and certain medical specialties.

The administrative fee amount being finalized in these final rules is applied equally to both parties to a dispute. The Departments are of the view that it would be inequitable to charge a smaller party a lower administrative fee, because a dispute initiated by a smaller party costs the Departments the same amount to process as a dispute initiated by a larger party. Furthermore, the value of a dispute, rather than the size of the party, determines whether it will be cost-effective for the party to pursue the dispute. For example, a smaller party could initiate a high dollar value dispute, while a larger party could initiate a small dollar value dispute. The Departments proposed in the IDR Operations proposed rules to charge both parties a reduced administrative fee when the highest offer made during open negotiation is less than the full administrative fee amount,<sup>113</sup> which is intended to improve the accessibility of the Federal IDR process for parties to low-dollar disputes. The Departments anticipate that such parties may be smaller providers and facilities or independent practices. However, larger parties to low-dollar disputes would not be precluded from paying the reduced administrative fee as long as the dispute meets the aforementioned requirement.

The Departments considered the impact of the proposed \$150 administrative fee amount on the parties compared to the current \$50 administrative fee amount and the previous \$350 administrative fee amount. While the Departments understand that it may be economically infeasible to initiate some claims in the Federal IDR process due to the administrative and certified IDR entity fees associated with accessing the process, as discussed previously, the Departments are statutorily obligated to

<sup>108</sup> 88 FR 75744.

<sup>109</sup> Section 9816(c)(8)(B) of the Code, section 716(c)(8)(B) of ERISA, and section 2799A-1(c)(8)(B) of the PHS Act.

<sup>110</sup> 88 FR 75799.

<sup>111</sup> 88 FR 75800.

<sup>112</sup> 88 FR 75783 through 75791.

<sup>113</sup> 88 FR 75799.



charge an administrative fee amount such that the administrative fees paid are estimated to be equal to the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process.<sup>114</sup> The methodology used by the Departments is derived from this statutory language.

Congress did not include a dollar-value threshold for Federal IDR process disputes in the No Surprises Act. Rather, Congress opted to include a requirement in the No Surprises Act for each party to a dispute for which a certified IDR entity is selected to pay to the Departments, at such time and in such manner as specified by the Departments, a fee for participating in the Federal IDR process.<sup>115</sup> Therefore, regardless of the administrative fee amount, disputing parties must always evaluate whether it would be economically efficient to initiate a dispute in the Federal IDR process. Congress also provided in the No Surprises Act that the administrative fee amount is established by the Departments in a manner such that the total amount of fees paid for such year is estimated to be equal to the amount of expenditures estimated to be made by the Departments for such year in carrying out the Federal IDR process.<sup>116</sup>

In regard to comments stating that the administrative fee could result in narrowing networks, many factors may impact whether a provider, facility, or provider of air ambulance services and a plan or issuer will enter a network agreement with one another, including the market power of each party, Federal and State network adequacy laws, and other factors. The Departments acknowledge that the amount paid for out-of-network services is one of the factors that impacts market participants' decisions whether to enter network agreements. The No Surprises Act represents a substantial change to the way the parties come to agreement on payment for out-of-network services by prohibiting, in many circumstances, the practice of sending surprise medical bills to patients and establishing a Federal IDR process for determining the appropriate out-of-network rate. Many providers report that initial payments made by plans and issuers for out-of-network services are now substantially lower than such payments were before

enactment of the No Surprises Act. Some providers report that plans' and issuers' abilities to make lower payments for out-of-network services has impacted their willingness to offer acceptable in-network payment rates in network agreement negotiations. To the extent that the Federal IDR process and the prohibition on surprise medical billing change this equilibrium among parties, they could impact the number of providers and plans and issuers that are able to agree on terms for entering a network agreement and consequently network breadth.

In the IDR Operations proposed rules, the Departments are proposing a number of steps to accelerate throughput in the Federal IDR process,<sup>117</sup> which would make it easier for the parties to use the process to determine the appropriate payment amount for out-of-network services. That said, the appropriate payment rate for out-of-network services is only one factor among many that influences network breadth. It is also important for the parties to meaningfully engage in open negotiation to determine an appropriate out-of-network payment rate, since agreeing to rates in open negotiation allow the parties to avoid the costs of using the Federal IDR process. Even as the Federal IDR process becomes faster and more parties avail themselves of the opportunity to agree to out-of-network payment rates during the open negotiation period, the price paid for out-of-network services will remain one among many factors in a dynamic market. Furthermore, the Departments anticipate that a Federal IDR process with consistent payment determination outcomes will lead to fewer dispute initiations, because parties will have a better understanding of what a determination will likely be and more disputes would likely be settled in open negotiation or even earlier, resulting in the parties avoiding the costs associated with the Federal IDR process.

The Departments also do not anticipate that the policies finalized in these rules would cause plans and issuers to increase premiums, as further discussed in section IV.G of this preamble, or patient cost sharing, because administrative fees paid would likely represent a very small percentage of the costs considered by plans and issuers in calculating annual premiums or cost sharing.

Many commenters emphasized the importance of considering the proposed administrative fee amount alongside batching requirements to determine

whether the administrative fee amount would be cost-prohibitive. Some commenters suggested that batching policies could mitigate the financial challenges providers and facilities face, especially when pursuing low-dollar claims. A few commenters suggested it was premature to update the administrative fee amount or provide feedback on a proposed amount until batching guidance is updated. One commenter viewed an administrative fee of \$150 per party as reasonable so long as a claim is defined as an episode of care or a single medical encounter in the batching policy.

The Departments are continuing to assess batching flexibilities and the impact of batching on various parts of the Federal IDR process. To further improve batching requirements, the Departments proposed provisions in the IDR Operations proposed rules<sup>118</sup> that would allow for more clarity, certainty, and flexibility in batching multiple items or services in a single dispute.<sup>119</sup> These batching proposals are designed so that the expenses of engaging in the Federal IDR process, including the administrative fee, do not unreasonably impede parties' access to the Federal IDR process. As previously mentioned, the IDR Operations proposed rules<sup>120</sup> also proposed a reduced administrative fee for low-dollar disputes, identified as disputes for which the highest offer by either party in open negotiation was less than the administrative fee amount, which, if finalized, would mitigate financial burden on providers and facilities when pursuing payment on low-dollar claims. The Departments encourage interested parties to submit comments on the IDR Operations proposed rules prior to the comment deadline.<sup>121</sup>

<sup>118</sup> 88 FR 75744.

<sup>119</sup> On November 28, 2023, the Departments released FAQs pertaining to batching that will be effective until the IDR Operations proposed rules are finalized and take effect. These FAQs discuss how, in light of the *TMA IV* and *TMA III* opinions and orders, the batching requirements of the No Surprises Act apply to qualified IDR items and services for disputes eligible for initiation of the Federal IDR process on or after August 3, 2023, until the Departments engage in future notice and comment rulemaking. See U.S. Department of Health and Human Services, U.S. Department of Labor, U.S. Department of Treasury, Office of Personnel Management (November 28, 2023), *FAQs about Consolidated Appropriations Act, 2021 Implementation Part 63*, available at <https://www.cms.gov/files/document/faqs-part-63.pdf>.

<sup>120</sup> *Id.*

<sup>121</sup> As discussed earlier in this preamble section, the Departments were unable to propose these operational policies in the IDR Fees proposed rules because they are more comprehensive than the fee-related policies proposed in the IDR Fees proposed rules and require more time to develop and

<sup>114</sup> Section 9816(c)(8)(B) of the Code, section 716(c)(8)(B) of ERISA, and section 2799A–1(c)(8)(B) of the PHS Act.

<sup>115</sup> Section 9816(c)(8)(A) of the Code, section 716(c)(8)(A) of ERISA, and section 2799A–1(c)(8)(A) of the PHS Act.

<sup>116</sup> Section 9816(c)(8)(B) of the Code, section 716(c)(8)(B) of ERISA, and section 2799A–1(c)(8)(B) of the PHS Act.

<sup>117</sup> 88 FR 75744.

While the Departments continue to consider improvements to the Federal IDR process, including policies surrounding batching and low-dollar claims, the No Surprises Act requires that the administrative fee be estimated to cover the expenditures estimated to be made by the Departments in carrying out the Federal IDR process in the year, and the Departments estimate that \$115 per party per dispute is the appropriate administrative fee amount to meet this requirement for disputes initiated on or after the effective date of these rules.

#### *B. Certified IDR Entity Fee Ranges*

Under current regulations at 26 CFR 54.9816–8T(e)(2)(vii), 29 CFR 2590.716–8(e)(2)(vii), and 45 CFR 149.510(e)(2)(vii), the certified IDR entity fees for single and batched determinations are set by the certified IDR entities within the upper and lower limits of ranges for each as set forth in guidance issued annually by the Departments.

In the IDR Fees proposed rules, the Departments proposed to amend the provisions of the regulations establishing the ranges for certified IDR entity fees for single and batched disputes to establish the ranges in notice and comment rulemaking, rather than in guidance, at 26 CFR 54.9816–8(e)(2)(vii), 29 CFR 2590.716–8(e)(2)(vii), and 45 CFR 149.510(e)(2)(vii). Further, the IDR Fees proposed rules provided that, consistent with current rules, certified IDR entities must annually provide a fixed fee for single determinations and separate fixed fees for batched determinations within the upper and lower limits for each as set in notice and comment rulemaking. Additionally, the IDR Fees proposed rules provided that the certified IDR entity fee ranges established by the Departments in rulemaking would remain in effect until new certified IDR entity fee ranges are established by notice and comment rulemaking,<sup>122</sup> allowing the Departments to update the certified IDR entity fee ranges more or less frequently than annually. Finally, the Departments proposed that the certified IDR entity or IDR entity seeking certification may seek advance written approval from the Departments to update its fees more often than once annually.

The Departments proposed that for disputes initiated on or after the later of the effective date of these rules or January 1, 2024, certified IDR entities

would be permitted to charge a fixed certified IDR entity fee for single determinations within the range of \$200 to \$840, unless a fee not within that range is approved by the Departments pursuant to paragraphs 26 CFR 54.9816–8(e)(2)(vii)(A) and (B), 29 CFR 2590.716–8(e)(2)(vii)(A) and (B), and 45 CFR 149.510(e)(2)(vii)(A) and (B). The Departments also proposed that for disputes initiated on or after the later of the effective date of these rules or January 1, 2024, certified IDR entities would be permitted to charge a fixed certified IDR entity fee for batched determinations within the range of \$268 to \$1,173, unless a fee outside this range is approved by the Departments pursuant to paragraphs 26 CFR 54.9816–8(e)(2)(vii)(A) and (B), 29 CFR 2590.716–8(e)(2)(vii)(A) and (B), and 45 CFR 149.510(e)(2)(vii)(A) and (B). The Departments proposed to continue to use a tiered fee structure based on the number of line items within the batch.<sup>123</sup> Under the IDR Fees proposed rules, certified IDR entities would be permitted to charge a fixed tiered fee within the range of \$75 to \$250 for every additional 25 line items within a batched dispute beginning with the 26th line item.<sup>124</sup> The IDR Fees proposed rules explained the Departments' considerations for proposing the certified IDR entity fee ranges, which included the anticipated time and resources needed for certified IDR entities to make payment determinations meeting the requirements of the statute, rules, and guidance; the anticipated time and resources needed for data reporting; the anticipated time and resources needed to comply with audit requirements; the anticipated volume of Federal IDR initiations and payment determination quality assessments; the anticipated volume of Federal IDR initiations ineligible for the Federal IDR process; and the level of complexity in determining the eligibility of items and services for the Federal IDR process.<sup>125</sup> These fee ranges would apply until another set of fee ranges is proposed and

finalized through notice and comment rulemaking.

If a certified IDR entity wishes to charge a fee outside either of these fee ranges, it would continue to follow the existing process for requesting written approval from the Departments outlined in 26 CFR 54.9816–8(e)(2)(vii)(A) and (B), 29 CFR 2590.716–8(e)(2)(vii)(A) and (B), and 45 CFR 149.510(e)(2)(vii)(A) and (B).

Since the publication of the IDR Fees proposed rules, the Departments have analyzed updated data and assumptions as applied to the factors considered in the IDR Fees proposed rules' preamble to set the fee ranges, and the Departments found that the results of the analysis remain the same. The Departments received comments on these proposals.

The Departments are finalizing as proposed the policy to establish the certified IDR entity fee ranges through notice and comment rulemaking, rather than guidance. The Departments are also finalizing the certified IDR entity fee ranges for single and batched disputes as proposed. Finally, the Departments are finalizing the fixed tier fee structure for batched disputes, as well as the range for this structure, as proposed.

However, after considering the public comments, the Departments are not finalizing the proposal which would have allowed the Departments to set the certified IDR entity fee ranges more frequently than annually but are instead finalizing the proposal with modifications to reflect that the certified IDR entity fee ranges may be established by the Departments no more frequently than annually through notice and comment rulemaking. Further, the Departments are finalizing the proposal that the certified IDR entity or IDR entity seeking certification may seek advance written approval from the Departments to update its fees more often than once annually, with modifications to reflect that in addition to setting their initial fee for the calendar year, certified IDR entities may only request approval from the Departments to update their fees one additional time per year, and with additional non-substantive modifications for readability. Finalizing this policy would result in a process where the certified IDR entity or IDR entity seeking certification sets their fixed fees for single and batched determinations for the year, and then is allowed one opportunity at any point during the calendar year to update their fixed fees, provided that their request is approved by the Departments.

<sup>123</sup> A tiered fee structure was first proposed in the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act and implemented for all disputes initiated as of January 1, 2023. See Centers for Medicare & Medicaid Services (October 31, 2022), *Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act*, <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

<sup>124</sup> 88 FR 65888.

<sup>125</sup> 88 FR 65888 at 65895 through 65896.

implement if finalized. There is an urgency to publish these final rules due to the need to sufficiently fund the Federal IDR process in 2024.

<sup>122</sup> 88 FR 65888.

Many commenters supported the proposal to establish the certified IDR entity fee ranges through notice and comment rulemaking. Several commenters noted that establishing the certified IDR entity fee ranges through notice and comment rulemaking would increase transparency and allow interested parties to provide feedback that would help the Departments appropriately adjust the fee ranges. Many commenters expressed opposition to the Departments' proposal to establish the certified IDR entity fee ranges more or less frequently than annually. The majority of these commenters encouraged the Departments to update the certified IDR entity fee ranges only once annually to create a more predictable and stable Federal IDR process. Several commenters expressed concern that changing the certified IDR entity fee ranges more frequently than once annually would prevent providers from effectively budgeting for participation in the Federal IDR process, which would create a barrier to access. A few commenters noted that unpredictable changes to the certified IDR entity fee ranges could impact plans' and issuers' abilities to budget for the Federal IDR process and could lead plans and issuers to budget more conservatively and pass on the cost increase to consumers.

A few commenters generally supported the flexibility to update the certified IDR entity fee ranges more or less frequently than annually. However, one commenter supported the proposed flexibility only if the Departments adjusted the fee ranges less frequently than annually, while another commenter supported the proposed flexibility if the Departments provided adequate notice, such as 90 days, before implementing the changed fee ranges. Further, several commenters opposed the proposal to allow certified IDR entities or IDR entities seeking certification to seek advance written approval from the Departments to set their certified IDR entity fees more often than annually. Similar to the proposal to establish the certified IDR entity fees through notice and comment rulemaking more or less frequently than annually, some commenters expressed concerns that the proposed policy would cause unpredictability for the parties, which would impact their ability to effectively budget for the Federal IDR process. One commenter misinterpreted the proposed policy as proposing to require certified IDR entities to adjust their fees whenever operational or technological efficiencies

could justify a decrease in cost, and expressed concern that the proposed policy may discourage certified IDR entities from participating in the Federal IDR process. One commenter opposed multiple fee adjustments within a given year but supported allowing certified IDR entities a limit of one additional fee adjustment per year following a compelling request and formal approval.

The Departments agree with commenters that the proposal to establish the certified IDR entity fee ranges through notice and comment rulemaking will improve transparency and provide opportunity for greater engagement by interested parties in the establishment of the ranges. The Departments recognize commenters' concerns that the proposed flexibility to set the certified IDR entity fee ranges through notice and comment rulemaking more or less frequently than annually would enable multiple changes to the certified IDR entity fee ranges over the course of a year. In general, the Departments recognize that frequent changes to the established certified IDR entity fee ranges could increase unpredictability in the Federal IDR process and potentially burden parties, but note that they did not propose this policy with the intention of pursuing such frequent changes. The Departments contemplated establishing this proposed flexibility so that the certified IDR entity fee ranges could remain effective for multiple years. Further, updating the certified IDR entity fee ranges does not guarantee that certified IDR entities will set new fixed fee amounts. Each certified IDR entity determines their fee amounts independently, and there is no requirement to make a corresponding adjustment each time the certified IDR entity fee ranges established by the Departments change, provided the certified IDR entity's fee stays within the new range.

While it would be unlikely that the Departments would pursue multiple notice and comment rulemakings in a single year to adjust the certified IDR entity fee ranges, the Departments acknowledge the potential for the proposed policy to increase uncertainty within the Federal IDR process. Therefore, to be responsive to commenters' concerns, the Departments are finalizing this proposal with modifications to reflect that the certified IDR entity fee ranges may be established no more frequently than once per calendar year. This allows the certified IDR entity fee ranges to remain effective over multiple years until they are updated in notice and comment rulemaking, while addressing

commenters' concerns by preventing multiple adjustments of the certified IDR entity fee ranges in a single year.

The Departments acknowledge that frequent increases to certified IDR entity fees could lead to unpredictability and complicate the ability of the parties to effectively budget for the Federal IDR process. The Departments are of the view that the proposed mechanism for certified IDR entities to request to set their fees more than once annually includes sufficient guardrails to ensure that any changes to the certified IDR entities' fees would not prevent parties from accessing the Federal IDR process. Specifically, the Departments proposed to require certified IDR entities to submit the following information to the Departments in their requests: (1) the fixed fee that the certified IDR entity is seeking to charge; (2) a description that reasonably explains the circumstances that require a change to its fee; and (3) a detailed description that reasonably explains how the change to its fee will be used to mitigate the effects of these circumstances. The Departments would use their discretion to determine if the explanations included in the request demonstrate that the change would ensure the certified IDR entity's financial viability and would not impose on parties an undue barrier to accessing the Federal IDR process.

The Departments seek to strike a balance between predictable fees for parties participating in the Federal IDR process and certified IDR entities' need for flexibility to respond to circumstances that require fee adjustments to maintain program operations. For example, the Departments acknowledge that certified IDR entities consider various factors, including operational costs, in setting fees for the Federal IDR process. However, certified IDR entities have needed to increase staff resources, implement system updates, and adjust operations to respond to unexpectedly frequent changes to guidance or regulations governing the Federal IDR process or the volume of disputes initiated and closed under the Federal IDR process. To ensure that certified IDR entities have sufficient funding to respond to such circumstances, providing certified IDR entities with the ability to request an update to their fees one additional time during a calendar year is appropriate.

To address some of the concerns expressed by commenters, the Departments are finalizing this proposal with modifications to reflect that certified IDR entities may only request approval from the Departments to set their fee one additional time for a

calendar year. In other words, if a certified IDR entity wishes to update its fees an additional time after already setting fees for the calendar year, the certified IDR entity must seek approval from the Departments to do so. A certified IDR entity may set its fees at most two times for a calendar year, once at the initial setting of the fees, and once after receiving approval from the Departments to update the fees, regardless of whether the Departments have established new certified IDR fee ranges in notice and comment rulemaking. If the Departments reject a certified IDR entity's request to update its fees during the calendar year, the certified IDR entity may continue to seek approval by submitting subsequent requests as long as these requests comply with the requirements finalized in this rule.

If a certified IDR entity requests to update its fees after initially setting its fee for the calendar year, and the request is approved by the Departments, the change to its fees will be made public before those fees are effective, in a form and manner specified by the Secretary, to allow the parties time to consider the fee change in their decision making. Updated fees will apply to disputes initiated on or after the effective date of the fee amount. The modified policy will provide an appropriate amount of flexibility to certified IDR entities to make a fee adjustment to account for efficiencies and fluctuations in the conditions of the Federal IDR process in future years, while also capping the number of fee adjustments in a given calendar year and limiting cost volatility for parties participating in the Federal IDR process.

The Departments solicited comment on whether they should apply an inflationary adjustment, such as the CPI-U, to the considerations used to develop the certified IDR entity fee ranges in future years. One commenter supported the use of an inflationary adjustment and suggested updating the certified IDR entity fee ranges annually based on inflation rather than through notice and comment rulemaking. A few commenters opposed updating the certified IDR entity fee ranges using an inflationary adjustment such as the CPI-U. Specifically, one commenter posited that since the CPI-U is updated on a monthly basis, the Departments might pursue monthly adjustments to the certified IDR entity fee ranges, which would severely complicate the Federal IDR process. Another commenter expressed concern that applying an inflationary adjustment would only drive costs up over time, prompting plans and issuers to pass any additional

costs on to consumers. One commenter neither explicitly supported nor opposed the general use of an inflationary adjustment to set the certified IDR entity fee ranges but noted that setting the certified IDR entity fee ranges through notice and comment rulemaking could be an opportunity to adjust based on inflation. This commenter cautioned that if the Departments pursued the use of an inflationary adjustment, such an adjustment should be the only consideration used to update the certified IDR entity ranges.

The Departments appreciate the comments on the use of an inflationary adjustment to update the certified IDR entity fee in future years. The Department share the commenters' desire to maintain predictable and accessible costs for participating in the Federal IDR process and agree that additional adjustments to the fee ranges more frequently than annually would complicate the Federal IDR process for all parties. As stated earlier in this preamble, based on the comments received, the Departments are finalizing the proposal to establish the certified IDR entity fee ranges through notice and comment rulemaking, which will allow for greater transparency and feedback related to the establishment of the ranges. Further, the Departments are of the view that the considerations being finalized in this rulemaking are necessary to develop reasonable certified IDR entity fee ranges, and that the addition of inflationary adjustment to the considerations, or the exclusive use of an inflationary adjustment to develop the ranges, is not practical or necessary at this time. The Departments will continue to carefully consider whether such a policy may be appropriate in future rulemaking.

Several commenters expressed concerns with the proposed certified IDR entity fee ranges' increased upper limits. Some of these commenters stated that the proposed certified IDR entity fee ranges may be cost-prohibitive and limit access to the Federal IDR process, particularly for small providers. A few of the commenters opposed to the proposed increase in the upper limits of the certified IDR entity fee ranges asserted that any increase in the certified IDR entity fee ranges would limit participation in the Federal IDR process. Specifically, one of these commenters asserted that the proposed ranges would result in costs passed on to patients in the form of increased premiums and cost-sharing amounts.

Some commenters, however, supported the proposed certified IDR entity fee ranges. Some of these

commenters asserted that the increase to the upper limit of the certified IDR fee ranges is reasonable and will encourage greater plan and issuer participation prior to the Federal IDR process, such as during open negotiation, and will reduce the time needed for certified IDR entities to render payment determinations.

The Departments maintain the view that the proposed certified IDR entity fee ranges will keep costs reasonable such that participating in the Federal IDR process will not be cost-prohibitive, including for smaller providers, while also ensuring that certified IDR entities are able to cover their operating costs and continue participating in the Federal IDR process. The Departments acknowledge that broadening the certified IDR entity fee ranges could have an impact on the cost to parties to engage in the Federal IDR process. However, the current range of fees charged by certified IDR entities reflects that, since the opening of the Federal IDR process, certified IDR entities do not all charge the same fees, nor do they all charge the maximum fee amount in the ranges set by the Departments.<sup>126</sup> To remain competitive, the certified IDR entities have an incentive to charge fees on the lower end of the established range. As a result, the Departments do not believe that an increase to the upper limits of the certified IDR entity fee ranges will result in drastic increases to the fees charged by certified IDR entities. Further, the Departments have not seen any data suggesting that the proposed increases to the certified IDR entity fee ranges will result in a substantial enough increase in costs to plans and issuers that they will impact patients in the form of increased premiums and cost-sharing amounts. However, the Departments will continue to monitor this dynamic.

The Departments agree with commenters asserting that the increases to the certified IDR entity fee ranges will encourage greater plan and issuer participation prior to the Federal IDR process, such as during open negotiation. The Departments believe that the increases to the certified IDR entity fee ranges will encourage parties to actively participate in open negotiation to preclude the need for the Federal IDR process, thereby eliminating the need for parties to pay the certified IDR entity fee.

The Departments emphasize that while they establish ranges for the certified IDR entity fees, certified IDR entities choose the fixed fees they

<sup>126</sup> See <https://www.cms.gov/nosurprises/help-resolve-payment-disputes/certified-idre-list>.

charge for single and batched determinations based on a number of factors. As noted earlier in this preamble, certified IDR entities have needed to make numerous adjustments in response to high volumes of disputes, complex determinations, and litigation resulting in changes to guidance and regulations governing the Federal IDR process. The proposed ranges for the single and batched determination fees, including the proposed range for the tiered fee for batched determinations, allow for appropriate compensation corresponding to the complexity and effort associated with making eligibility and payment determinations. The Departments remain of the view that the proposed ranges would keep costs for participating in the Federal IDR process reasonable and reduce the potential for increased costs to be passed on to patients.

Several commenters opposed the proposed tiered fee structure for batched determinations. Commenters were concerned that the proposed tiered fee structure would be cost-prohibitive, particularly due to the absence of a limitation on the number of line items considered in the price tiers (that is, no line item cap to the application of the tiered fee, as currently exists). Further, some commenters asserted that the proposed tiered fee structure and range would disincentivize the submission of batched disputes.

A few commenters supported an increased fee for larger batched determinations but recommended that the tiering structure reflect intervals of 50 line items rather than 25. Further, one commenter supported a fixed-dollar tiered fee, as opposed to a range, suggesting that a fixed-dollar fee would provide more consistency across the fees charged by different certified IDR entities and avoid potential issues such as certified IDR entities being overwhelmed with disputes and resulting delays in the Federal IDR process.

The proposed tiered fee structure and range reflect the Departments' intent to keep the costs of participating in the Federal IDR process affordable while ensuring that certified IDR entities are compensated for their work in rendering payment determinations on complex batched disputes. Certified IDR entities have indicated to the Departments that making determinations on large batches of dissimilar items and services is particularly complex and burdensome and that they generally do not realize economies of scale as the number of batched line items increases. The Departments considered the impact of the *TMA IV* opinion and order as

discussed in section I.C of this preamble on the anticipated complexity and volume of batched disputes while determining the certified IDR entity fee ranges. The Departments acknowledge the efficiencies gained by batching and believe that the proposed tiered fee structure would maintain those efficiencies while allowing certified IDR entities to charge a reasonable fee for the level of work involved in batched determinations.

Several commenters stated that the proposed tiered fee structure might increase the costs to disputing parties submitting batched disputes with many line items because there is no cap to the number of line items within a batched dispute after which the tiered fee would no longer apply.

A tiered fee selected by each certified IDR entity from a dollar range established by the Departments allows for greater flexibility, as opposed to applying a standard fixed dollar amount or applying a percentage of the certified IDR entity's batched determination fee as is currently used.<sup>127</sup> The tiered fee range reflects the costs associated with increasing line items in a batched dispute and provides certified IDR entities the appropriate flexibility to set fees commensurate with their costs. Additionally, the Departments believe that a dollar range based on the number of line items in a batched dispute would provide transparent and consistent pricing for both parties and certified IDR entities. The Departments agree that instances of batched disputes with exceedingly high numbers of line items occur infrequently but remain a possible occurrence. In addition, as mentioned previously, certified IDR entities have indicated that they generally do not realize economies of scale for batched disputes with high numbers of line items. For instance, certified IDR entities often need to verify the acuity of every patient in a batch, even when the service is the same. Given the anticipated infrequency of batched disputes with exceedingly high numbers of line items and in recognition of the need for the certified IDR entity to cover its costs for such batched disputes, the Departments believe the tiered fee structure is a reasonable approach.

The Departments also considered whether certified IDR entities should be

permitted to charge only an additional fixed dollar amount (for example, \$125, \$150, \$200, etc.) per every additional 25 line items but determined that the proposed range for a tiered fee would provide the appropriate operational flexibility for certified IDR entities. Providing this flexibility is important to maintain participation of certified IDR entities in the Federal IDR process. The operational costs for the Federal IDR process incurred by each certified IDR entity may vary, requiring certified IDR entities to consider their unique circumstances in determining their fixed fee amounts to maintain financial viability. Therefore, allowing certified IDR entities to select a tiered fee within a dollar range established by the Departments will allow the certified IDR entities the flexibility to tailor their pricing to fit their company's needs, while ensuring reasonable costs for parties participating in the Federal IDR process.

For the purposes of the batched tiered fee range intervals, the Departments considered whether a grouping of 50 line items would be a more appropriate interval than the proposed interval of 25 line items. A few commenters suggested that 50 line items would be a more appropriate interval than the proposed 25-line-item increment. In determining the interval appropriate for the tiered fee range for batched determinations, the Departments considered historical trends in the number of line items submitted in batched disputes in addition to the anticipated changes in batching behaviors due to the *TMA IV* vacatur of certain batching provisions. The Departments remain of the view that a 25-line-item increment is the most reasonable increment to balance the affordability to parties and the amount of resources expended by the certified IDR entities to review those line items. As a result, the Departments are finalizing this policy as proposed.

### III. Severability

In the event that any portion of these final rules is declared invalid, the Departments intend that the various aspects of the finalized administrative fee provisions and certified IDR entity fee provisions be severable. The Departments proposed at 26 CFR 54.9816–8(d)(3)(i), 29 CFR 2590.716–8(d)(3)(i), and 45 CFR 149.510(d)(3)(i) that any provision of paragraph (d) or paragraphs (e)(2)(vii) through (e)(2)(ix) held to be invalid or unenforceable as applied to any person or circumstance would be construed so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly

<sup>127</sup> See Centers for Medicare & Medicaid Services (December 23, 2022). *Amendment to the Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act: Change in Administrative Fee*. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/amended-cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

situated or to dissimilar circumstances, unless such holding is that the provision of these paragraphs is invalid and unenforceable in all circumstances, in which event the provision would be severable from the remainder of these paragraphs and would not affect the remainder thereof. The Departments further proposed at new 26 CFR 54.9816–8(d)(3)(ii), 29 CFR 2590.716–8(d)(3)(ii), and 45 CFR 149.510(d)(3)(ii) that the provisions in paragraphs (d) and (e)(2)(vii) through (ix) are intended to be severable from each other. Additionally, the Departments further proposed that if a court were to find unlawful the administrative fee policies, the certified IDR entity fee policies should stand. In the alternative, if a court were to find unlawful the certified IDR entity fee policies, the administrative fee policies should stand.

A few commenters supported the proposed severability provisions. These commenters stated that the provisions would help mitigate uncertainty that may result from future court decisions if a lawsuit occurs.

The Departments agree that the severability clause will help mitigate uncertainty. After considering the comments, the Departments are finalizing these policies as proposed, with a technical modification that the provisions in 26 CFR 54.9816–8(d) and (e)(2)(vii) and (viii), 29 CFR 2590.716–8(d) and (e)(2)(vii) and (viii), and 45 CFR 149.510(d) and (e)(2)(vii) and (viii) are intended to be severable, rather than 26 CFR 54.9816–8(d) and (e)(2)(vii) through (ix), 29 CFR 2590.716–8(d) and (e)(2)(vii) through (ix), and 45 CFR 149.510(d) and (e)(2)(vii) through (ix). This technical modification is due to the restructuring of the regulatory text in these final rules pertaining to certified IDR entity fees at 26 CFR 54.9816–8(e)(2)(vii) and (viii), 29 CFR 2590.716–8(e)(2)(vii) and (viii), and 45 CFR 149.510(e)(2)(vii) and (viii) compared to what was proposed, as discussed further in section II.B of this preamble.

The Departments further clarify their intent that the methodology being adopted here to set the administrative fee amount and the considerations the Departments used in developing the certified IDR entity fee ranges are also intended to be severable. Should any aspect of the methodology or considerations be determined to be unlawful, the Departments intend for the administrative fee amount or certified IDR entity fee ranges to be adjusted by applying the methodology in accordance with the remaining elements of the methodology or considerations. For instance, if it is determined that certain expenditures

should not have been included in calculating the administrative fee amount, then the Departments would implement these rules by eliminating those expenditures from the total expenditures estimated to be made by the Departments in carrying out the Federal IDR process, and dividing the new expenditures amount by the same estimated number of administrative fees paid to calculate the new administrative fee amount. The resulting administrative fee amount would be immediately effective, without requiring additional notice and comment rulemaking.

#### **IV. Economic Impact and Paperwork Burden**

##### *A. Summary—Departments of Health and Human Services and Labor*

These final rules establish the administrative fee amount and the certified IDR entity fee ranges in notice and comment rulemaking, and the preamble sets forth the methodology for setting the administrative fee amount and the considerations used to develop the certified IDR entity fee. The Departments have examined the effects of these final rules as required by Executive Order 13563 (76 FR 3821, January 21, 2011, Improving Regulation and Regulatory Review); Executive Order 12866 (58 FR 51735, October 4, 1993, Regulatory Planning and Review); Executive Order 14094 (88 FR 21879, April 11, 2023, Modernizing Regulatory Review); the Regulatory Flexibility Act (Pub. L. 96–354, September 19, 1980); section 1102(b) of the Social Security Act (42 U.S.C. 1102(b)); section 202 of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4, March 22, 1995); and Executive Order 13132 (64 FR 43255, August 10, 1999, Federalism).

##### *B. Executive Orders 12866, 13563, and 14094—Departments of Health and Human Services and Labor*

Executive Orders 12866, 13563, and 14094 direct Federal agencies to assess all costs and benefits of available regulatory alternatives and if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Under Executive Order 12866, “significant” regulatory actions are subject to review by the Office of Management and Budget (OMB). Executive Order 14094, entitled “Modernizing Regulatory Review” (hereinafter, the Modernizing E.O.), amends section 3(f) of Executive Order 12866 (Regulatory Planning and

Review). The amended section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule: (1) having an annual effect on the economy of \$200 million or more in any 1 year (adjusted every 3 years by the Administrator of OMB’s Office of Information and Regulatory Affairs (OIRA) for changes in gross domestic product), or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, territorial, or tribal governments or communities; (2) creating a serious inconsistency or otherwise interfering with an action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising legal or policy issues for which centralized review would meaningfully further the President’s priorities or the principles set forth in this Executive order, as specifically authorized in a timely manner by the Administrator of OIRA in each case.

A regulatory impact analysis (RIA) must be prepared for rules deemed significant. OMB’s OIRA has deemed this rule significant. The Departments have prepared an RIA that to the best of their ability presents the costs and benefits of these rules. OMB has reviewed these final regulations, and the Departments have provided the following assessment of their impact.

##### *C. Need for Regulatory Action—Departments of Health and Human Services and Labor*

The Departments are amending the certified IDR entity and administrative fee provisions of the rules for the Federal IDR process to set the administrative fee amount and the certified IDR entity fee ranges in notice and comment rulemaking, and set forth the methodology for setting the administrative fee amount and the considerations for developing the certified IDR entity fee ranges. These policies will ensure that all interested parties are sufficiently notified and provided an opportunity to comment on the fees associated with the Federal IDR process.

##### *D. Summary of Impacts and Accounting Table—Departments of Health and Human Services and Labor*

The expected benefits and costs of these final rules are summarized in Table 1 and discussed in this section of the preamble. In accordance with OMB Circular A–4, Table 1 depicts an

accounting statement summarizing the Departments' assessment of the benefits, costs, and transfers associated with this regulatory action. The Departments are

unable to quantify all benefits and costs of these final rules but have sought, where possible, to describe these non-quantified impacts. The effects in Table

1 reflect non-quantified impacts and estimated direct monetary costs resulting from the provisions of these final rules.

**TABLE 1: Accounting Table**

Accounting Statement				
Benefits:				
Non-Quantified:				
<ul style="list-style-type: none"> <li>Increased interested party transparency as a result of the policies to establish the administrative fee amount and certified IDR entity fee ranges in notice and comment rulemaking, as well as setting forth the methodology for calculating the administrative fee amount and the considerations for developing the certified IDR entity fee ranges.</li> </ul>				
Costs:	Estimate	Year Dollar	Discount Rate	Period Covered
Annualized	\$0.14 million	2023	7 percent	2023-2027
Monetized (\$/Year)	\$0.13 million	2023	3 percent	2023-2027
Quantified:				
<ul style="list-style-type: none"> <li>Costs to interested parties of \$638,631 to review and interpret these rules in 2023.</li> </ul>				
Transfers:	Estimate	Year Dollar	Discount Rate	Period Covered
Annualized	\$31.65 million	2023	7 percent	2023-2027
Monetized (\$/year)	\$32.31 million	2023	3 percent	2023-2027
Quantified:				
<ul style="list-style-type: none"> <li>Transfers from the parties to the Federal Government of approximately \$32 million annually beginning in 2024 as a result of the policy to set the administrative fee amount at \$115 per party per dispute for disputes initiated on or after the effective date of these rules.</li> <li>Transfers from the parties to certified IDR entities of approximately \$9 million annually beginning in 2024 as a result of the policy to set the certified IDR entity fee ranges at \$200-\$840 for single determinations, \$268-\$1,173 for batched determinations, and an additional \$75-\$250 for every 25 line items in excess of the first 25 line items.</li> </ul>				

#### 1. Benefits

The primary benefit of these final rules is to allow the Federal IDR process to function through establishing the administrative fee amount and certified IDR entity fee ranges in rulemaking and establishing the amounts of these fees for disputes initiated on or after the effective date of these rules. In response to the opinion and order in *TMA IV*, these final rules are necessary in order to set the administrative fee amount as close to January 1, 2024 as possible, because the current \$50 administrative fee amount is insufficient to satisfy the statutory requirement that the total amount of fees paid for the year be estimated to be equal to the amount of expenditures estimated to be made by the Departments in carrying out the Federal IDR process. The primary non-quantifiable benefit of these final rules is the continuation of a functioning Federal IDR process, which helps to protect consumers from certain surprise medical bills and helps providers to receive compensation for certain out-of-network services. Additional benefits

specific to each Federal IDR process fee type appear in the following sections.

##### a. Administrative Fee Amount and Methodology

The Departments are finalizing the proposal to establish the administrative fee amount in notice and comment rulemaking for disputes initiated on or after the effective date of these rules, and the Departments are setting forth the methodology for determining the administrative fee amount. Utilizing notice and comment rulemaking will increase transparency of the administrative fee-setting process and allow interested parties to provide feedback to the Departments prior to the Departments setting the administrative fee amount.

The Departments sought comment on these benefits. The Departments received comments on these benefits and respond to these comments in section II.A of this preamble. The Departments are finalizing these benefits as proposed.

##### b. Certified IDR Entity Fee Ranges

The Departments proposed to establish the certified IDR entity fee ranges for single and batched determinations, which include a tiered fee range for batched determinations that exceed 25 line items, in notice and comment rulemaking for disputes initiated on or after the effective date of these rules. Utilizing notice and comment rulemaking to set the appropriate ranges for certified IDR entity fees will increase transparency for parties interested in the certified IDR entity fee ranges and allow these parties to identify in advance the impacts of changing the certified IDR entity fee ranges.

The Departments sought comment on these benefits. The Departments received comments on these benefits and respond to these comments in section II.B of this preamble. The Departments are finalizing these benefits as proposed.



## 2. Costs

### a. Administrative Fee Amount and Methodology

The Departments are finalizing the proposal to establish the administrative fee amount in notice and comment rulemaking for disputes initiated on or after the effective date of these rules, and set forth the methodology for setting the administrative fee amount with modifications described in section II.A of this preamble to ensure that disputing and other parties are sufficiently notified and provided an opportunity to comment on the administrative fee amount. The Departments are also finalizing the administrative fee amount for disputes initiated on or after the effective date of these rules at \$115 per party per dispute.

The current administrative fee is \$50 per party per dispute.<sup>128</sup> In the IDR Fees proposed rules, the Departments estimated that approximately 225,000 disputes are closed per year.<sup>129</sup> Therefore, if the current administrative fee were to remain applicable, the Departments estimated in the IDR Fees proposed rules that the parties would pay approximately \$22.5 million in administrative fees annually (225,000 disputes  $\times$  2 parties per dispute  $\times$  \$50 per party). In the IDR Fees proposed rules, the Departments also estimated that if they were to finalize an administrative fee amount of \$150 per party per dispute for disputes initiated on or after the effective date of these rules, the parties would pay approximately \$67.5 million in administrative fees annually beginning in 2024 (225,000 disputes  $\times$  2 parties per dispute  $\times$  \$150 per party), assuming the number of disputes remains stable year over year and the administrative fee amount is not subsequently changed through notice and comment rulemaking. Therefore, in the IDR Fees

proposed rules, the Departments estimated that the costs associated with this proposal, if finalized, would be approximately \$45 million (\$67.5 million if this proposal is finalized minus \$22.5 million if the status quo were to continue).

The Departments sought comment on these costs and assumptions. The Departments received comments on these assumptions.

Several commenters suggested that the Departments' estimate of 225,000 closed disputes is too low. A few commenters suggested that the Departments are underestimating utilization of the Federal IDR process and recommended that the Departments analyze the available data from States implementing similar policies before the No Surprises Act. Several commenters disagreed with the assumption used to calculate the 225,000 closed disputes, which assumed that *TMA IV*'s vacatur of batching regulations and guidance would reduce the volume of disputes by 25 percent.

As discussed in section II.A of this preamble, after consideration of comments, the Departments are finalizing the administrative fee using the estimated total number of administrative fees paid to certified IDR entities, rather than the projected total number of closed disputes, to estimate the number of administrative fees to be paid under the administrative fee methodology. Federal IDR process data show that the monthly average number of administrative fees paid to certified IDR entities between February 2023 and July 2023 was 41,000. The Departments project this monthly average forward by 12 months to estimate 492,000 administrative fees paid in a year.

After consideration of public comments, the Departments are modifying the proposed assumptions and cost estimates as follows. If the current administrative fee were to remain applicable, the parties would pay approximately \$24.6 million in administrative fees annually (492,000 administrative fees paid  $\times$  \$50 per party per dispute). As stated in section II.A of this preamble, the estimated \$24.6 million in administrative fee collections if the Departments were to retain the current \$50 administrative fee would be inadequate for the Departments to carry out the Federal IDR process in 2024, as they estimate the expenditures to be made in 2024 to be approximately \$56.6 million. As the Departments are now finalizing an administrative fee amount of \$115 per party per dispute for disputes initiated on or after the effective date of these rules, the Departments estimate that the parties

will pay approximately \$56.6 million in administrative fees annually beginning in 2024 (492,000 administrative fees paid  $\times$  \$115 per party per dispute), which is sufficient to cover the estimated annual expenditures of approximately \$56.6 million, assuming the number of administrative fees paid remains stable year over year and the administrative fee amount is not subsequently changed through notice and comment rulemaking. Therefore, the costs associated with this policy are approximately \$32.0 million (\$56.6 million minus \$24.6 million if the status quo were to continue).

### b. Certified IDR Entity Fee Ranges

The Departments are finalizing the proposal to set the certified IDR entity fee ranges for single and batched determinations, with a tiered fee range for batched determinations that exceed 25 line items, in notice and comment rulemaking for disputes initiated on or after the effective date of these rules in response to the opinion and order in *TMA IV* to ensure that interested parties are sufficiently notified and provided an opportunity to comment on the certified IDR entity fee ranges. The certified IDR entity fee range for single determinations for disputes initiated on or after the effective date of these rules is \$200 to \$840. The certified IDR entity fee range for batched disputes initiated on or after the effective date of these rules is \$268 to \$1,173. Further, the tiered fee range for batched determination for disputes initiated on or after the effective date of these rules is \$75 to \$250.

While the certified IDR entities are responsible for setting their fees for single and batched determinations, the Departments acknowledge that the changes to the certified IDR entity fee ranges may impact the cost to the parties to participate in the Federal IDR process. The Departments anticipate that the vacatur of batching standards by the District Court's opinion and order in *TMA IV* could result in initiating parties submitting single and batched disputes in proportions similar to those prior to the issuance of the August 2022 guidance, which interpreted the now-vacated standards for batching qualified IDR items or services. Based on internal data relating to disputes initiated prior to the establishment of the now vacated batching criteria that were released in August 2022, approximately 70 percent of disputes at the time were single disputes and approximately 30 percent were batched disputes.<sup>130</sup> The

<sup>128</sup> As a result of the opinion and order in *TMA IV*, which vacated the portion of the December 2022 guidance that increased the administrative fee amount to \$350 per party per dispute for disputes initiated during calendar year 2023, the administrative fee amount reverted to the amount established in the October 2022 guidance. See Centers for Medicare & Medicaid Services (August 11, 2023). Federal Independent Dispute Resolution (IDR) Process Administrative Fee FAQs. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/no-surprises-act-independent-dispute-resolution-administrative-fee-frequently-asked-questions.pdf>. Also see Centers for Medicare & Medicaid Services (October 31, 2022). Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

<sup>129</sup> The details of the calculation of the number of disputes are provided at 88 FR 65893.

<sup>130</sup> The Departments estimate that currently approximately 80 percent of disputes are single

Departments anticipate that, as a result of *TMA IV*, initiating parties will return to the batching practices they engaged in prior to issuance of the August 2022 guidance, such as initiating a higher proportion of batched disputes and including more items or services within those batched disputes.

Based on internal Federal IDR process data, the Departments estimate that certified IDR entities collect a certified IDR entity fee for approximately 135,000 disputes annually.<sup>131</sup> Therefore, for the purposes of this analysis, the Departments estimate that certified IDR entities will collect certified IDR entity fees for approximately 94,500 single disputes and 40,500 batched disputes annually ( $135,000 \times 0.70$  and  $135,000 \times 0.30$ , respectively). The Departments acknowledge that each party must pay a certified IDR entity fee to the certified IDR entity no later than the time that party submits its offer. However, because the non-prevailing party is ultimately responsible for the full certified IDR entity fee, which is retained by the certified IDR entity for the IDR services it performed, it is the Departments' position that providing a per-dispute calculation reasonably captures the overall cost of the dispute with respect to the certified IDR entity fee without implicating false precision on the amount of certified IDR entity fee costs that initiating and non-initiating parties ultimately may incur.

To develop a reasonable estimate for the certified IDR entity fee amount for both single and batched disputes, the Departments assume that the certified IDR entities will set single determination fixed fees that approximate the median value of the finalized fee range and will set batched determination fixed fees that approximate the 3rd quartile of the finalized fee range.<sup>132</sup> Therefore, for the purposes of this analysis, the Departments estimate that the typical single determination fixed fee (range \$200–\$840) will be approximately \$520, and that the typical batched

determination fixed fee (range \$268–\$1,173) will be approximately \$947. At an estimated cost of \$520 per single determination for approximately 94,500 single determinations annually, the Departments estimate that single determinations will cost disputing parties approximately \$49,140,000 annually ( $\$520 \times 94,500$ ). At an estimated cost of \$947 per batched determination for approximately 40,500 batched determinations annually, the Departments estimate that batched determinations will cost disputing parties approximately \$38,353,500 annually ( $\$947 \times 40,500$ ).

Further, the Departments estimate that using the finalized tiered fee range for batched determinations, certified IDR entities will set and apply a fixed fee that approximates the average of the proposed range (\$75–\$250) for batched determinations based on the number of line items. The Departments estimate that certified IDR entities will typically set their tiered fee at approximately \$163. The Departments acknowledge the uncertainty surrounding the number of line items that may be submitted in batched disputes due to the *TMA IV* opinion and order. However, to produce an estimate, and for the purposes of this analysis, the Departments estimate that of the total estimated 40,500 batched disputes, approximately 4,455 batched determinations will potentially be subject to at least 2 applications of the tiered fee ( $\$163 \times 2 = \$326$ ).<sup>133</sup> The Departments therefore estimate that this subset of approximately 4,455 batched determinations exceeding 25 line items will cost disputing parties approximately \$1,452,330 annually ( $\$326 \times 4,455$ ). In total, assuming the number of disputes remains stable year over year, the Departments estimate the parties will pay approximately \$89 million in certified IDR entity fees annually in accordance with the finalized policies (\$49,140,000 for single determinations + \$38,353,500 for batched determinations + \$1,452,330 for the subset of batched determinations subject to the tiered fee).

The calendar year 2023 certified IDR entity fee ranges for single determinations and batched determinations are \$200–\$700 and \$268–\$938, respectively. Certified IDR entities currently charge a median fixed fee of \$549 for single determinations

and \$770 for batched determinations in 2023. Therefore, for approximately 108,000 single determinations and 24,840 batched determinations (not subject to the batched percentage fee amount) annually,<sup>134</sup> if current certified IDR entity fixed fees remained applicable, the Departments estimate that the parties would pay approximately \$59,292,000 for single determinations ( $\$549 \times 108,000$ ) and \$19,126,800 for batched determinations ( $\$770 \times 24,840$ ). Current guidance permits certified IDR entities to charge a batching percentage on batched determinations based on the number of line items.<sup>135</sup> For the purposes of this analysis, the Departments assume that a subset of approximately 8 percent of batched determinations, or 2,160 determinations, potentially subject to the batched percentages would receive at least a 120 percent increase from the median batched determination fixed fee ( $\$770 \times 1.20 = \$924$ ). As such, the Departments estimate that the parties would pay approximately \$1,995,840 for this subset of batched determinations potentially subject to a batching percentage ( $2,160 \times \$924$ ), resulting in a total cost of approximately \$80 million under the current calendar year 2023 certified IDR entity fee structure (\$59,292,000 for single determinations + \$19,126,800 for batched determinations + \$1,995,840 for the subset of batched determinations subject to the tiered fee). Therefore, taking into account the current costs to the parties associated with the current certified IDR entity fee structure, the total cost to the parties

<sup>134</sup> The Departments estimate that 80 percent of disputes are single disputes and 20 percent are batched disputes ( $135,000 \times 0.80$  and  $135,000 \times 0.20$ , respectively). For the purposes of this analysis, the Departments estimate that a subset of approximately 8 percent, or 2,160 batched disputes would be subject to a batching percentage ( $27,000 \times 0.08$ ).

<sup>135</sup> Without the need to seek further approval, to account for the differential in the workload of batched determinations, a certified IDR entity may charge the following percentages of its approved certified IDR entity batched determination fee ("batching percentage") for batched determinations, which are based on the number of line items initially submitted in the batch:

- 2–20 line items: 100 percent of the approved batched determination fee;
- 21–50 line items: 110 percent of the approved batched determination fee;
- 51–80 line items: 120 percent of the approved batched determination fee; and
- 81 line items or more: 130 percent of the approved batched determination fee.

See Centers for Medicare & Medicaid Services (October 31, 2022). *Calendar Year 2023 Fee Guidance for the Federal Independent Dispute Resolution Process under the No Surprises Act*. <https://www.cms.gov/ccio/resources/regulations-and-guidance/downloads/cy2023-fee-guidance-federal-independent-dispute-resolution-process-nsa.pdf>.

disputes and 20 percent of disputes are batched disputes, and the Departments anticipate that this ratio will return to 70 percent of disputes being single disputes and 30 percent of disputes being batched disputes beginning in calendar year 2024.

<sup>131</sup> While the administrative fee must be paid by the disputing party for any dispute for which a certified IDR entity is selected, the certified IDR entity fee is only assessed for disputes that are determined eligible for the Federal IDR process.

<sup>132</sup> The Departments anticipate that, due to the uncertainty around batching practices as a result of the *TMA IV* opinion and order, certified IDR entities will likely choose to increase their batched determination fee. Therefore, using the 75th percentile of the proposed fee range to calculate the cost of batched determinations provides a reasonable approximation of the expected increase.

<sup>133</sup> Based on internal data the Departments estimate that approximately 11 percent of batched disputes submitted prior to the establishment of the batching criteria released in August 2022 exceeded 25 line items. For this reason, we project that a similar number of batched disputes with number of line items exceeding 25 line items will be submitted due to *TMA IV*.

associated with this policy is approximately \$9 million (\$89 million as finalized minus \$80 million if the status quo fee ranges were to continue).

The Departments sought comment on these costs and assumptions. The Departments did not receive comments on these costs or assumptions and are finalizing them as proposed.

### 3. Uncertainties

It is unclear whether the Federal IDR process will experience the same operating conditions when these rules are effective compared to the current state, such as the number of disputes initiated, future policy changes finalized after future notice and comment rulemaking, or increased or decreased costs by the Departments to carry out the Federal IDR process. Due to the need to take point-in-time estimates of volume and expenditures for the purposes of developing the analyses in the preamble to these rules, there is inherent uncertainty in the estimates in these analyses as the data are constantly changing. It is difficult to project the impact on the administrative fee amount charged to the parties if the Federal IDR process landscape changes. Although the Departments have analyzed the Federal IDR process data available to inform their projections, it is uncertain whether the trends in these data will remain applicable in the future. At the same time, the Departments do not know what impact the changes to the Federal IDR process as a result of the District Court's opinions and orders in *TMA IV* and *TMA III* will have on the number of disputes initiated and the time it will take certified IDR entities to close those disputes. The Departments continue to monitor trends in the Federal IDR process and will make any necessary changes through future notice and comment rulemaking.

### 4. Regulatory Review Cost Estimation

If regulations impose administrative costs on entities, such as the time needed to read and interpret rules, regulatory agencies should estimate the total cost associated with regulatory review. Based on comments received for the July 2021 interim final rules and October 2021 interim final rules, the Departments estimate that more than 2,100 entities will review these final rules, including 1,500 issuers, 205 third party administrators (TPAs), and at least 395 other interested parties (for example, State insurance departments, State legislatures, industry associations, advocacy organizations, and providers and provider organizations). The Departments acknowledge that this assumption may understate or overstate

the number of entities that will review these final rules.

Using the median hourly wage rate from the Bureau of Labor Statistics for a Lawyer (Code 23–1011) to account for average labor costs (including a 100 percent increase for the cost of fringe benefits and other indirect costs), the Departments estimate that the cost of reviewing these final rules will be \$130.52 per hour.<sup>136</sup> The Departments estimate, based on an estimated rule length of approximately 35,000 words and an average reading speed of 200 to 250 words per minute, that it will take each reviewing entity approximately 2.33 hours to review these final rules, with an associated cost of approximately \$304.11 (2.33 hours × \$130.52 per hour). Therefore, the Departments estimate that the total burden to review these final rules will be approximately 4,893 hours (2,100 reviewers × 2.33 hours per reviewer), with an associated cost of approximately \$638,631 (2,100 reviewers × \$304.11 per reviewer).

The Departments sought comments in the IDR Fees proposed rules on this approach to estimating the total burden and cost for interested parties to read and interpret the IDR Fees proposed rules, which is the same approach used to estimate the total burden and cost for interested parties to read and interpret these final rules. The Departments did not receive comments on this approach and cost. The Departments are finalizing these estimates as proposed.

#### *E. Regulatory Alternatives—Departments of Health and Human Services and Labor*

In developing these final rules, the Departments considered various alternative approaches.

#### 1. Administrative Fee Amount and Methodology (26 CFR 54.9816–8(d)(2), 29 CFR 2590.716–8(d)(2), and 45 CFR 149.510(d)(2))

In its *TMA IV* opinion and order, the District Court indicated that notice and comment rulemaking is necessary to set the administrative fee, and the Departments are of the view that alternative approaches would lead to unnecessary uncertainty. In addition, providing a description of the methodology used to calculate the fee amount and proposing the administrative fee amount in the IDR Fees proposed rules would increase transparency for the parties and provide interested parties the opportunity to be

included in the fee setting process. The Departments considered that guidance has historically been used to set the administrative fee amount based on concerns that the requirement to collect fees sufficient to fund the Federal IDR process. The lead time required to set the fee amount in notice and comment rulemaking could constrain the Departments' responsiveness to program needs and artificially inflate the administrative fee amount due to the need to ensure adequate funding of the process. However, in light of *TMA IV*, the increased transparency and opportunity for interested parties to provide feedback on the administrative fee methodology and amount outweighed the potential concern that the administrative fee might be artificially inflated by the need to make conservative estimates to set the administrative fee amount further in advance through notice and comment rulemaking.

The Departments considered proposing other administrative fee policies in the IDR Fees proposed rules, such as those proposed in the IDR Operations proposed rules.<sup>137</sup> However, as discussed in section II.A of this preamble, the Departments were unable to propose those policies in the IDR Fees proposed rules because they are much more comprehensive than the fee-related policies proposed in the IDR Fees proposed rules and would require more time to develop and implement if finalized. There is an urgency to publish these final rules to be effective as close to January 1, 2024 as possible due to the need to sufficiently fund the Federal IDR process in 2024. As discussed in sections I.E and II.A of these final rules, the current \$50 administrative amount is insufficient to satisfy the statutory requirement that the total amount of fees paid for a year be estimated to be equal to the amount of expenditures estimated to be made by the Departments for the year in carrying out the Federal IDR process. Therefore, the Departments deferred those substantial changes to the Federal IDR process and administrative fee structure and collection procedures to the IDR Operations proposed rules, which are aimed at improving Federal IDR process operations and making the process more accessible.

#### 2. Certified IDR Entity Fee Ranges (26 CFR 54.9816–8(e)(2), 29 CFR 2590.716–8(e)(2), and 45 CFR 149.510(e)(2))

The Departments considered maintaining the current policy that the allowable ranges for certified IDR entity

<sup>136</sup> U.S. Bureau of Labor Statistics (May 1, 2022). *May 2022 National Occupational Employment and Wage Estimates*. [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm).

<sup>137</sup> 88 FR 75744.

fees would be set in guidance yearly instead of through notice and comment rulemaking. The Departments considered whether continuing to set the certified IDR entity fee ranges in guidance would preserve necessary flexibility for the certified IDR entities to choose their fixed fees within the allowable ranges and submit those fees for approval to the Departments, and would allow the Departments time to review and approve each certified IDR entity's fees and publish them in advance of the year to which the fees apply. The Departments concluded that publishing the fee ranges in guidance could be a more expedient process compared to rulemaking because of the lack of required comment period; however, establishing the fee ranges through notice and comment rulemaking would not prevent the Departments from reviewing and approving each certified IDR entity's fixed fee amounts in a timely manner. The Departments are of the view that there would be no impact to the ability of the certified IDR entities to select their fees from the established ranges if those ranges were published through notice and comment rulemaking. Further, setting the certified IDR entity fee ranges through guidance does not allow interested parties to engage through the submission of public comments, while the notice and comment rulemaking process increases transparency and will afford an opportunity for the Departments to consider feedback from interested parties on the appropriateness of proposed fee ranges.

#### F. Paperwork Reduction Act

These final rules are not subject to the requirements of the Paperwork Reduction Act of 1995,<sup>138</sup> because the Departments anticipate that fewer than 10 certified IDR entities will submit requests to update their certified IDR entity fees an additional time during the calendar year based on current experience operating the Federal IDR process, and they do not contain any other collection of information as defined in 44 U.S.C. 3502(3). Therefore, clearance by OMB under the Paperwork Reduction Act of 1995 is not required.

#### G. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601, *et seq.*) requires agencies to analyze options for regulatory relief of small entities and to prepare a final regulatory flexibility analysis to describe the impact of these final rules on small entities, unless the head of the

agency can certify that the rule would not have a significant economic impact on a substantial number of small entities. The RFA generally defines a "small entity" as (1) a proprietary firm meeting the size standards of the Small Business Administration (SBA), (2) a not-for-profit organization that is not dominant in its field, or (3) a small government jurisdiction with a population of less than 50,000. States and individuals are not included in the definition of "small entity." The Departments use a change in revenues of more than 3 to 5 percent as their measure of significant economic impact on a substantial number of small entities. For purposes of the RFA, small entities include small businesses, nonprofit organizations, and small governmental jurisdictions. The Secretaries of Labor, the Treasury, and Health and Human Services certify that these final rules will not have a significant economic impact on a substantial number of small entities, as presented in the analysis in the following subsections of this preamble.

#### 1. Small Entities Regulated

The provisions in these final rules will affect plans (or their TPAs),<sup>139</sup> health insurance issuers offering group or individual health insurance coverage, and providers, facilities, and providers of air ambulance services.

For purposes of analysis under the RFA,<sup>140</sup> the Departments consider an employee benefit plan with fewer than 100 participants to be a small entity.<sup>141</sup> The basis of this definition is found in section 104(a)(2) of ERISA,<sup>142</sup> which permits the Secretary of Labor to prescribe simplified annual reports for plans that cover fewer than 100 participants. Under section 104(a)(3),<sup>143</sup> the Secretary may also provide for exemptions or simplified annual reporting and disclosure for welfare benefit plans. Under the authority of section 104(a)(3),<sup>144</sup> the Department of Labor has previously issued simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans, which cover fewer than 100 participants and satisfy certain

requirements.<sup>145</sup> While some large employers have small plans, small plans are generally maintained by small employers. Thus, the Departments are of the view that assessing the impact of these final rules on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of a small entity considered appropriate for this purpose differs, however, from a definition of a small business based on size standards issued by the SBA<sup>146</sup> in accordance with the Small Business Act.<sup>147</sup>

In 2021, there were 1,500 issuers in the U.S. health insurance market<sup>148</sup> and 205 TPAs.<sup>149</sup> Health insurance issuers are generally classified under the North American Industry Classification System (NAICS) code 524114 (Direct Health and Medical Insurance Carriers). According to SBA size standards,<sup>150</sup> entities with average annual receipts of \$47 million or less are considered small entities for this NAICS code. The Departments expect that few, if any, insurance companies underwriting health insurance policies fall below these size thresholds. Based on data from Medical Loss Ratio (MLR) annual report submissions for the 2021 MLR reporting year, approximately 87 out of 483 issuers of health insurance coverage nationwide had total premium revenue of \$47 million or less.<sup>151</sup> However, it should be noted that also based on MLR data, over 77 percent of these small companies belong to larger holding groups, and many, if not all, of these small companies, are likely to have non-health lines of business that would result in their revenues exceeding \$47 million. The Departments are of the view that the same assumptions also apply to TPAs that would be affected by these proposed rules.<sup>152</sup> To produce a conservative estimate, for the purposes of this analysis, the Departments assume 4.1 percent, or 62 issuers and 8 TPAs, of the total of 1,500 health insurance

<sup>145</sup> 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10.

<sup>146</sup> 13 CFR 121.201 (2011).

<sup>147</sup> 15 U.S.C. 631 *et seq.* (2011).

<sup>148</sup> Centers for Medicare & Medicaid Services (2022). *Medical Loss Ratio Data and System Resources*. <https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr>.

<sup>149</sup> Non-issuer TPAs based on data derived from the 2016 benefit year reinsurance program contributions.

<sup>150</sup> United States Small Business Administration (March 17, 2023). *Table of Size Standards*. <https://www.sba.gov/document/support-table-size-standards>.

<sup>151</sup> Centers for Medicare & Medicaid Services (2022). *Medical Loss Ratio Data and System Resources*. <https://www.cms.gov/CCIIO/Resources/Data-Resources/mlr>.

<sup>152</sup> The Departments are of the view that most TPAs are also issuers.

<sup>138</sup> 44 U.S.C. 3501 *et seq.*

<sup>139</sup> The Departments expect that most self-insured group health plans will work with a TPA to meet the requirements.

<sup>140</sup> 5 U.S.C. 601, *et seq.*

<sup>141</sup> The Department of Labor consulted with the Small Business Administration Office of Advocacy in making this determination, as required by 5 U.S.C. 603(c) and 13 CFR 121.903(c) in a memo dated June 4, 2020.

<sup>142</sup> 29 U.S.C. 1024(a)(2).

<sup>143</sup> 29 U.S.C. 1024(a)(3).

<sup>144</sup> *Id.*

issuers and 205 TPAs across the country, are considered small entities.<sup>153</sup>

These final rules also affect health care providers and facilities due to the proposed requirements related to the certified IDR entity and administrative fees. The Departments estimate that 140,270 physicians, on average, bill on an out-of-network basis annually.<sup>154</sup> The number of small physician providers is estimated based on the SBA's size standards. The size standard applied for providers is NAICS 62111 (Offices of Physicians), for which a business with less than \$16 million in receipts is considered to be small. By this standard, the Departments estimate that 47.2 percent or 66,207 physicians are considered small under the SBA's size standards.<sup>155</sup> The size standard for facilities is NAICS 62211 (General Medical and Surgical Hospitals), for which a business with less than \$47 million in receipts is considered to be small. By this standard, the Departments estimate that 43.5 percent or 1,113 facilities are considered small under the SBA's size standards.<sup>156</sup> These final rules are also expected to affect non-physician providers who bill on an out-of-network basis. The Departments lack data on the number of non-physician providers who will be impacted by these final rules.

The Departments do not have the same level of data for the air ambulance subsector. In 2020, the total revenue of providers of air ambulance services was estimated to be \$4.2 billion, with 1,114

air ambulance bases.<sup>157</sup> This results in an industry average of \$3.8 million per air ambulance base. Based on a 2020 U.S.C.-Brookings Schaeffer report on air ambulance services,<sup>158</sup> by 2017, large private equity firms controlled roughly two-thirds of the air ambulance market.

Although based on the Departments' experience operating the Federal IDR process, significantly fewer than 67,320 small providers and facilities have accessed the process to date,<sup>159</sup> the Departments lack adequate data to better inform the number of small providers impacted by these final rules. Therefore, although the estimate of 67,320 small providers and facilities is likely a significant overestimate of the number of small providers and facilities impacted by these final rules, the Departments use this number of small providers and facilities in this analysis to be conservative.<sup>160</sup>

Additionally, as discussed in the *Partial Report on the Federal Independent Dispute Resolution (IDR) Process, October 1–December 31, 2022*, the top 10 initiating parties (or entities acting on behalf of initiating parties) are large companies that initiate approximately 85 percent of disputes, and the top 10 non-initiating parties are large companies that are initiated against in approximately 95 percent of disputes.<sup>161</sup> Therefore, for purposes of

this analysis, the Departments assume that only 15 percent of all disputes involve small providers. The 5 percent of all disputes that do not involve the top 10 non-initiating parties could involve any of the 1,695 issuers and TPAs that are not the top 10 non-initiating parties (1,500 issuers and 205 TPAs total – 10 top non-initiating parties = 1,695 remaining issuers and TPAs). The Departments assume that the proportion of small issuers and TPAs to non-top 10 issuers and TPAs is the same as the proportion of disputes involving small issuers and TPAs to disputes involving non-top 10 issuers and TPAs, as the volume of disputes issuers and TPAs are involved in should be proportional to the size of their enrollment. Taking into consideration these estimates of the small entities, the policies in these rules that result in an increased burden to small entities are described below.

## 2. Compliance Costs

The Departments are finalizing the policy to establish the administrative fee amount in notice and comment rulemaking and are finalizing that the administrative fee amount for disputes initiated on or after the effective date of these rules is \$115 per party per dispute. The annual burden per small provider or facility associated with this policy is \$115,<sup>162</sup> and the annual burden per small issuer/TPA is \$805.<sup>163</sup> For more details, please refer to the Regulatory Impact Analysis in these final rules.

2022. (n.d.). <https://www.cms.gov/files/document/partial-report-idr-process-octoberdecember-2022.pdf>.

<sup>162</sup> 492,000 administrative fees paid/2 types of parties = 246,000 administrative fees paid by providers. 246,000 administrative fees paid by providers – 85 percent (209,100) administrative fees paid for disputes initiated by the top 10 initiating parties = 36,900 administrative fees paid for disputes initiated by other initiating parties. 36,900 disputes/67,320 small providers and facilities = approximately 0.5 disputes initiated per small provider or facility annually. For simplicity and to be conservative, the Departments assume 1 dispute per provider or facility. 1 dispute × \$115 per dispute = \$115 per small provider or facility.

<sup>163</sup> 492,000 administrative fees paid/2 types of parties = 246,000 administrative fees paid by issuers/TPAs. 246,000 administrative fees paid by issuers/TPAs – 95 percent (233,700) administrative fees paid for disputes initiated against the top 10 non-initiating parties = 12,300 administrative fees paid for disputes initiated against other non-initiating parties. 12,300 disputes/1,695 issuers/TPAs = approximately 7 disputes per small issuer/TPA annually. 7 disputes × \$115 per dispute = \$805.

<sup>153</sup> These numbers are calculated as follows: 77 percent of small companies belong to larger holding groups, so 23 percent do not and would be small entities.  $87 \text{ issuers} \times 0.23 = 20$ .  $20/483 = 4.1$  percent. Applying the 4.1 percent to 1,500 issuers and 205 TPAs total = 62 small issuers and 8 small TPAs.

<sup>154</sup> See 86 FR 56051 for more information on this estimate.

<sup>155</sup> Based on data from the NAICS Association for NAICS code 62111, the Departments estimate the percent of businesses within the industry of Offices of Physicians with less than \$16 million in annual sales. United States Census Bureau (May 2021). *2017 SUSB Annual Data Tables by Establishment Industry*. <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>.

<sup>156</sup> Based on data from the NAICS Association for NAICS code 62211, the Departments estimate the percent of businesses within the industry of General Medical and Surgical Hospitals with less than \$47 million in annual sales. United States Census Bureau (May 2021). *2017 SUSB Annual Data Tables by Establishment Industry*. <https://www.census.gov/data/tables/2017/econ/susb/2017-susb-annual.html>.

<sup>157</sup> ASPE Office of Health Policy (September 10, 2021). *Air Ambulance Use and Surprise Billing*. <https://aspe.hhs.gov/sites/default/files/2021-09/aspe-air-ambulance-ib-09-10-2021.pdf>.

<sup>158</sup> Adler, L., Hannick, K., and Lee, S. "High Air Ambulance Charges Concentrated in Private Equity-Owned Carriers." U.S.C.-Brookings Schaeffer Initiative for Health Policy. October 13, 2020. <https://www.brookings.edu/articles/high-air-ambulance-charges-concentrated-in-private-equity-owned-carriers/>.

<sup>159</sup> See U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury, *Partial Report on the Federal Independent Dispute Resolution (IDR) Process, October 1–December 31, 2022*. (n.d.). <https://www.cms.gov/files/document/partial-report-idr-process-octoberdecember-2022.pdf>.

<sup>160</sup> Based on the Departments' experience operating the Federal IDR process, the estimate of 67,320 small providers and facilities is likely a significant overestimate, and therefore the Departments assume that this estimate accounts for any non-physician providers who may be impacted by these rules for whom the Departments lack data to estimate.

<sup>161</sup> Top initiating parties represent hundreds of individual providers across multiple states. Top non-initiating parties operate across multiple states and market segments. See U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury, *Partial Report on the Federal Independent Dispute Resolution (IDR) Process, October 1–December 31,*

The Departments are finalizing the policy to establish the certified IDR entity fee ranges in notice and comment rulemaking and are finalizing that the ranges are \$200–\$840 for single determinations and \$268–\$1,173 for batched determinations, with a \$75–\$250 tiered fee range for disputes that

contain more than 25 line items. The annual burden per small provider or facility associated with this policy is \$657,<sup>164</sup> and the annual burden per small issuer/TPA is \$1,971.<sup>165</sup> For more details, please refer to the Regulatory Impact Analysis in these final rules.

Thus, the per-entity annual cost for small providers and facilities is \$772,

and the per-entity annual cost for small issuers and TPAs is \$2,776. The total estimated annual cost for small providers and facilities is \$51,971,040, and the total estimated annual cost for small issuers and TPA is \$194,320. See Tables 2 and 3.

**TABLE 2: Detailed Annual Costs for Small Entities**

Description of Cost	Annual Cost per Small Provider or Facility	Annual Cost per Small Issuer/TPA
Administrative Fee	\$115	\$805
Certified IDR Entity Fee	\$657	\$1,971
Total	\$772	\$2,776

**TABLE 3: Aggregate Annual Costs for Small Entities**

Affected Entity	Affected Small Entities	Annual Cost per Entity	Aggregate Annual Cost for Small Entities
Provider or Facility	67,320	\$772	\$51,971,040
Issuer/TPA	70	\$2,776	\$194,320

### 3. Analysis and Certification Statement

The annual cost per small provider or facility of \$772 is approximately 0.07 percent of the average annual receipts per small provider and approximately 0.04 percent of the average annual receipts per small facility. The Departments anticipate that small providers and facilities would be unlikely to initiate disputes and thereby incur these costs unless they anticipate prevailing in the dispute and receiving payment from plans or issuers that exceed the costs incurred to initiate the dispute. Additionally, data from the public reports on the Federal IDR process released to date by the

Departments show that providers and facilities prevail in approximately 70 percent of disputes.<sup>166</sup> Therefore, small providers and facilities are likely to experience an increase in receipts commensurate or larger than the increase in costs.

The annual cost per small issuer/TPA of \$2,776 is approximately 0.15 percent of the average annual receipts per small issuer/TPA. While small issuers/TPAs could pass on these increased costs to consumers in the form of higher premiums (or for TPAs, higher administration fees), resulting in an increase in receipts commensurate with the increase in costs, the actual increase

in costs and subsequent impact on revenue would be *de minimis* as the annual cost per small issuer/TPA is so small. Additionally, the Departments anticipate that by batching qualified IDR items and services, there may be a reduction in the per-service cost of the Federal IDR process to providers of certain services and specialties, and potentially the aggregate administrative costs, because the Federal IDR process is likely to exhibit at least some economies of scale.<sup>167</sup>

As its measure of significant economic impact on a substantial number of small entities, HHS uses a change in revenue of more than 3 to 5

<sup>164</sup> Data from the first full year of Federal IDR process operations show that initiating parties prevail in approximately 70 percent of disputes. See Centers for Medicare & Medicaid Services (April 27, 2023). *Federal Independent Dispute Resolution Process—Status Update*. Therefore, as the prevailing party's certified IDR entity fee is refunded per 26 CFR 54.9816–8T(d)(1)(ii), 29 CFR 2590.716–8(d)(1)(ii), and 45 CFR 149.510(d)(1)(ii), initiating parties only pay the certified IDR entity fee for 30 percent of disputes, while non-initiating parties pay for the other 70 percent. <https://www.cms.gov/files/document/federal-idr-processstatus-update-april-2023.pdf>. The Departments estimate based on internal data that certified IDR entity fees are paid for approximately 135,000 disputes annually. Of those 135,000 disputes, the Departments estimate that 30 percent (or 40,500) have their certified IDR entity fees paid by providers/facilities, and 70 percent (or 94,500) have their certified IDR entity fees paid by issuers/

TPAs. Of the 40,500 disputes for which the certified IDR entity fee is paid by providers or facilities, 85 percent (or 34,425) are paid by the top 10 initiating parties. The remaining 15 percent (or 6,075) are paid by other initiating parties. 6,075 disputes/67,320 small providers and facilities = less than 1 certified IDR entity fee paid per small provider or facility. For simplicity and to be conservative, the Departments assume 1 certified IDR entity fee paid per small provider or facility. The average certified IDR entity fee across both single and batched disputes, including the tiered batched fee, in 2024 is \$657 as calculated in accordance with these final rules.

<sup>165</sup> Of the 94,500 disputes that have their certified IDR entity fees paid by issuers, 95 percent (or 89,775) are paid by the top 10 non-initiating parties. The remaining 5 percent (or 4,725) are paid by other non-initiating parties. 4,725 disputes/1,695 issuers/TPAs = approximately 3 certified IDR entity fees paid per small issuer/TPA. The average certified

IDR entity fee across both single and batched disputes, including the tiered batched fee, in 2024 is \$657 as calculated in accordance with these final rules. 3 disputes × \$657 per dispute = \$1,971 per small issuer/TPA.

<sup>166</sup> See U.S. Department of Health and Human Services, U.S. Department of Labor, and U.S. Department of the Treasury, *Partial Report on the Federal Independent Dispute Resolution (IDR) Process, October 1–December 31, 2022*. (n.d.). <https://www.cms.gov/files/document/partial-report-idr-process-octoberdecember-2022.pdf>.

<sup>167</sup> Fielder, M., Adler, L., Ippolito, B. (March 16, 2021). *Recommendations for Implementing the No Surprises Act*. U.S.C.-Brookings Schaeffer on Health Policy. <https://www.brookings.edu/blog/usc-brookings-schaeffer-on-health-policy/2021/03/16/recommendations-for-implementing-the-no-surprises-act/>.

percent. The Departments are of the view that this threshold will not be reached by the requirements in these final rules, given that the annual per-entity cost of \$2,776 per small issuer/TPA represents 0.15 percent of the average annual receipts for a small issuer/TPA and the annual per-entity cost of \$772 per small provider/facility represents 0.07 percent and 0.04 percent of the average annual receipts for a small provider or facility, respectively.<sup>168</sup> Therefore, the Secretaries of Labor, the Treasury, and Health and Human Services hereby certify that these final rules will not have a significant economic impact on a substantial number of small entities.

The Departments sought comment on this analysis and sought information on the number of small plans (or TPAs), issuers, providers, and facilities that may be affected by the provisions in the IDR Fees proposed rules. The Departments did not receive comments on this analysis. The Departments received comments on the impact of the provisions in the IDR Fees proposed rules on small providers and respond to those comments in section II of this preamble.

In addition, section 1102(b) of the Social Security Act requires the Departments to prepare a regulatory impact analysis if a rule may have a significant impact on the operations of a substantial number of small rural hospitals. This analysis must conform to the provisions of section 603 of the RFA.<sup>169</sup> For purposes of section 1102(b) of the Act, the Departments define a small rural hospital as a hospital that is located outside of a metropolitan statistical area and has fewer than 100 beds. These final rules are not subject to section 1102 of the Act because the IDR Fees proposed rules were not proposed under title XVIII, title XIX, or part B of title XI of the Act, and therefore section 1102(b) of the Act does not apply.

#### *H. Special Analyses—Department of the Treasury*

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of

Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required. Pursuant to section 7805(f) of the Code,<sup>170</sup> these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### *I. Unfunded Mandates Reform Act*

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA)<sup>171</sup> requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a proposed rule or any final rule for which a general notice of proposed rulemaking was published that includes any Federal mandate that may result in expenditures in any 1 year by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million in 1995 dollars, updated annually for inflation. That threshold is approximately \$177 million in 2023. As discussed earlier in the RIA, plans, issuers, TPAs, and providers, facilities, and providers of air ambulance services will incur costs to comply with the provisions of these final rules. The Departments estimate the combined impact on State, local, or tribal governments and the private sector will not be above the threshold.

#### *J. Federalism*

Executive Order 13132 outlines the fundamental principles of federalism. It requires adherence to specific criteria by Federal agencies in formulating and implementing policies that have “substantial direct effects” on the States, the relationship between the National Government and States, or on the distribution of power and responsibilities among the various levels of government. Federal agencies issuing regulations that have these federalism implications must consult with State and local officials and describe the extent of their consultation and the nature of the concerns of State and local officials in the preamble to the IDR Fees proposed rules.

The Departments do not anticipate that these final rules will have federalism implications or limit the policy-making discretion of the States in compliance with the requirement of Executive Order 13132.

State and local government health plans may be subject to the Federal IDR

process where a specified State law or All-Payer Model Agreement does not apply. The No Surprises Act authorizes States to enforce the new requirements, including those related to balance billing, for issuers, providers, facilities, and providers of air ambulance services, with HHS enforcing only in cases where the State has notified HHS that the State does not have the authority to enforce or is otherwise not enforcing, or HHS has made a determination that a State has failed to substantially enforce the requirements. However, in the Departments’ view, the federalism implications of these final rules are substantially mitigated because some States have their own process for determining the total amount payable under a plan or coverage for out-of-network emergency services and to out-of-network providers for patient visits to in-network facilities for non-emergency services. Where a State has a specified State law, the State law, rather than the Federal IDR process, will apply.

In compliance with the requirement of Executive Order 13132 that agencies examine closely any policies that may have federalism implications or limit the policy making discretion of the States, the Departments have engaged in efforts to consult with and work cooperatively with affected States, including participating in conference calls with and attending conferences of the National Association of Insurance Commissioners and consulting with State insurance officials on an individual basis.

While developing these rules, the Departments attempted to balance the States’ interests in regulating health insurance issuers with the need to ensure market stability. By doing so, the Departments complied with the requirements of Executive Order 13132.

In accordance with Federal law, a summary of these rules may be found at <https://www.regulations.gov/>.

#### **List of Subjects**

##### *26 CFR Part 54*

Excise taxes, Pensions, Reporting and recordkeeping requirements.

##### *29 CFR Part 2590*

Continuation coverage, Disclosure, Employee benefit plans, Group health plans, Health care, Health insurance, Medical child support, Reporting and recordkeeping requirements.

<sup>168</sup> United States Census Bureau (March 2020). 2017 SUSB Annual Data Tables by Establishment Industry, Data by Enterprise Receipt Size. <https://www.census.gov/data/tables/2020/econ/susb/2020-susb-annual.html>.

<sup>169</sup> 5 U.S.C. 603.

<sup>170</sup> 26 U.S.C. 7805(f).

<sup>171</sup> 2 U.S.C. 1511.



## 45 CFR Part 149

Balance billing, Health care, Health insurance, Reporting, and recordkeeping requirements, Surprise billing.

**Douglas W. O'Donnell,**

*Deputy Commissioner for Services and Enforcement, Internal Revenue Service.*

**Lily L. Batchelder,**

*Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury.*

**Lisa M. Gomez**

*Assistant Secretary, Employee Benefits Security Administration, Department of Labor.*

**Xavier Becerra,**

*Secretary, Department of Health and Human Services.*

## DEPARTMENT OF THE TREASURY

## Internal Revenue Service

## 26 CFR Part 54

For the reasons stated in the preamble, the Department of the Treasury and the IRS amend 26 CFR part 54 as set forth below:

## PART 54—PENSION EXCISE TAXES

■ 1. The authority citation for part 54 is amended by adding an entry for § 54.9816–8 in numerical order to read in part as follows:

**Authority:** 26 U.S.C. 7805 \* \* \*

\* \* \* \* \*

Section 54.9816–8 also issued under 26 U.S.C. 9816.

\* \* \* \* \*

■ 2. Section 54.9816–8 is amended by revising paragraphs (a), (b), (c) introductory text, (d), and (e) and adding headings for paragraphs (f) and (g) to read as follows:

**§ 54.9816–8 Independent dispute resolution process.**

(a) *Scope and definitions.* For further guidance, see § 54.9816–8T(a).

(b) *Determination of payment amount through open negotiation and initiation of the Federal IDR process.* For further guidance, see § 54.9816–8T(b).

(c) *Federal IDR process following initiation.* For further guidance, see § 54.9816–8T(c) introductory text through (c)(3).

\* \* \* \* \*

(d) *Costs of IDR process—(1) Certified IDR entity fee.* For further guidance, see § 54.9816–8T(d)(1).

(2) *Administrative fee.* (i) For further guidance, see § 54.9816–8T(d)(2)(i).

(ii) The administrative fee amount will be established through notice and comment rulemaking no more frequently than once per calendar year in a manner such that the total administrative fees paid for a year are

estimated to be equal to the amount of expenditures estimated to be made by the Secretaries of the Treasury, Labor, and Health and Human Services for the year in carrying out the Federal IDR process. The administrative fee amount will remain in effect until changed by notice and comment rulemaking. For disputes initiated on or after January 22, 2024, the administrative fee amount is \$115 per party per dispute.

(3) *Severability.* (i) Any provision of this paragraph (d) or paragraphs (e)(2)(vii) and (viii) of this section held to be invalid or unenforceable as applied to any person or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this paragraph (d) or paragraphs (e)(2)(vii) and (viii) is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this paragraph (d) or paragraphs (e)(2)(vii) and (viii) and shall not affect the remainder thereof.

(ii) The provisions in this paragraph (d) and paragraphs (e)(2)(vii) and (viii) of this section are intended to be severable from each other.

(e) *Certification of IDR entity—(1) In general.* For further guidance see § 54.9816–8T(e)(1).

(2) *Requirements.* (i) For further guidance, see § 54.8616–8T(e)(2)(i) through (vi).

(ii) through (vi) [Reserved]

(vii) Provide, no more frequently than once per calendar year, a fixed fee for single determinations and a separate fixed fee for batched determinations, as well as additional fixed tiered fees for batched determinations, if applicable, within the upper and lower limits for each, as established by the Secretary in notice and comment rulemaking. The certified IDR entity fee ranges established by the Secretary in rulemaking will remain in effect until changed by notice and comment rulemaking. The certified IDR entity may not charge a fee outside the limits set forth in rulemaking unless the certified IDR entity or IDR entity seeking certification receives advance written approval from the Secretary to charge a fixed fee beyond the upper or lower limits by following the process described in paragraph (e)(2)(vii)(A) of this section. A certified IDR entity may also seek advance written approval from the Secretary to update its fees one additional time per calendar year by meeting the requirements described in paragraph (e)(2)(vii)(A). The Secretary

will approve a request to charge a fixed fee beyond the upper or lower limits for fees as set forth in rulemaking or to update the fixed fee during the calendar year if, in their discretion, they determine the information submitted by a certified IDR entity or IDR entity seeking certification demonstrates that the proposed change to the certified IDR entity fee would ensure the financial viability of the certified IDR entity or IDR entity seeking certification and would not impose on parties an undue barrier to accessing the Federal IDR process.

(A) In order for the certified IDR entity or IDR entity seeking certification to receive the Secretary's written approval to charge a fixed fee beyond the upper or lower limits for fees as set forth in rulemaking or to update the fixed fee during the calendar year, the certified IDR entity or IDR entity seeking certification must submit to the Secretary, in the form and manner specified by the Secretary:

(1) The fixed fee the certified IDR entity or IDR entity seeking certification believes is appropriate for the certified IDR entity or IDR entity seeking certification to charge;

(2) A description of the circumstances that require the alternative fixed fee, or that require a change to the fixed fee during the calendar year, as applicable; and

(3) A detailed description that reasonably explains how the alternative fixed fee or the change to the fixed fee during the calendar year, as applicable, will be used to mitigate the effects of those circumstances.

(B) [Reserved]

(viii) For disputes initiated on or after January 22, 2024, certified IDR entities are permitted to charge a fixed certified IDR entity fee for single determinations within the range of \$200 to \$840, and a fixed certified IDR entity fee for batched determinations within the range of \$268 to \$1,173, unless a fee outside such ranges is approved by the Secretary, pursuant to paragraph (e)(2)(vii)(A) of this section. As part of the batched determination fee, certified IDR entities are permitted to charge an additional fixed tiered fee within the range of \$75 to \$250 for every additional 25 line items within a batched dispute, beginning with the 26th line item. The ranges for the certified IDR entity fees for single and batched determinations will remain in effect until changed by notice and comment rulemaking.

(ix) For further guidance, see § 54.9816–8T(e)(2)(ix) through (xii).

(x) through (xii) [Reserved]

(f) *Reporting of information relating to the Federal IDR process.* \* \* \*

(g) *Extension of time periods for extenuating circumstances.* \* \* \*

- 3. Section 54.9816–8T is amended by:
  - a. Revising paragraph (d)(2)(ii);
  - b. Adding paragraph (d)(3);
  - c. Removing the semicolon at the end of paragraphs (e)(2)(iii) and (vi) and adding a period in its place;
  - d. Revising paragraph (e)(2)(vii);
  - e. Redesignating paragraphs (e)(2)(viii) through (xi) as paragraphs (e)(2)(ix) through (xii);
  - f. Adding new paragraph (e)(2)(viii);
  - g. Removing the semicolon at the end of newly redesignated paragraphs (e)(2)(ix) and (x) and adding a period in its place; and
  - h. Removing “; and” at the end of newly redesignated paragraph (e)(2)(xii) and adding a period in its place.

The revisions and additions read as follows:

**§ 54.9816–8T Independent dispute resolution process (temporary).**

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(ii) For further guidance, see

§ 54.9816–8(d)(2)(ii).

(3) *Severability.* For further guidance, see § 54.9816–8(d)(3).

(e) \* \* \*

(2) \* \* \*

(vii) For further guidance, see

§ 54.9816–8(e)(2)(vii).

(viii) For further guidance, see

§ 54.9816–8(e)(2)(viii).

\* \* \* \* \*

**DEPARTMENT OF LABOR**

**Employee Benefits Security Administration**

**29 CFR Chapter XXV**

For the reasons stated in the preamble, the Department of Labor amends 29 CFR part 2590 as set forth below:

**PART 2590—RULES AND REGULATIONS FOR GROUP HEALTH PLANS**

- 4. The authority citation for part 2590 continues to read as follows:

**Authority:** 29 U.S.C. 1027, 1059, 1135, 1161–1168, 1169, 1181–1183, 1181 note, 1185, 1185a–n, 1191, 1191a, 1191b, and 1191c; sec. 101(g), Pub. L. 104–191, 110 Stat. 1936; sec. 401(b), Pub. L. 105–200, 112 Stat. 645 [42 U.S.C. 651 note]; sec. 512(d), Pub. L. 110–343, 122 Stat. 3881; sec. 1001, 1201, and 1562(e), Pub. L. 111–148, 124 Stat. 119, as amended by Pub. L. 111–152, 124 Stat. 1029; Division M, Pub. L. 113–235, 128 Stat. 2130;

Pub. L. 116–260, 134 Stat. 1182; Secretary of Labor’s Order 1–2011, 77 FR 1088 (Jan. 9, 2012).

- 5. Section 2590.716–8 is amended by:
  - a. Revising paragraph (d)(2)(ii);
  - b. Adding paragraph (d)(3);
  - c. Removing the semicolon at the end of paragraphs (e)(2)(iii) and (vi) and adding a period in its place;
  - d. Revising paragraph (e)(2)(vii);
  - e. Redesignating paragraphs (e)(2)(viii) through (xi) as paragraphs (e)(2)(ix) through (xii);
  - f. Adding new paragraph (e)(2)(viii);
  - g. Removing the semicolon at the end of newly redesignated paragraphs (e)(2)(ix) and (x) and adding a period in its place; and
  - h. Removing “; and” at the end of newly redesignated paragraph (e)(2)(xii) and adding a period in its place.

The revisions and additions read as follows:

**§ 2590.716–8 Independent dispute resolution process.**

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(ii) The administrative fee amount will be established through notice and comment rulemaking no more frequently than once per calendar year in a manner such that the total administrative fees paid for a year are estimated to be equal to the amount of expenditures estimated to be made by the Secretaries of the Treasury, Labor, and Health and Human Services for the year in carrying out the Federal IDR process. The administrative fee amount will remain in effect until changed by notice and comment rulemaking. For disputes initiated on or after January 22, 2024, the administrative fee amount is \$115 per party per dispute.

(3) *Severability.* (i) Any provision of this paragraph (d) or paragraphs (e)(2)(vii) and (viii) of this section held to be invalid or unenforceable as applied to any person or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this paragraph (d) or paragraphs (e)(2)(vii) and (viii) is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this paragraph (d) or paragraphs (e)(2)(vii) and (viii) and shall not affect the remainder thereof.

(ii) The provisions in this paragraph (d) and paragraphs (e)(2)(vii) and (viii) of this section are intended to be severable from each other.

(e) \* \* \*

(2) \* \* \*

(vii) Provide, no more frequently than once per calendar year, a fixed fee for single determinations and a separate fixed fee for batched determinations, as well as an additional fixed tiered fee for batched determinations, if applicable, within the upper and lower limits for each, as established by the Secretary in notice and comment rulemaking. The certified IDR entity fee ranges established by the Secretary in rulemaking will remain in effect until changed by notice and comment rulemaking. The certified IDR entity may not charge a fee outside the limits set forth in rulemaking unless the certified IDR entity or IDR entity seeking certification receives advance written approval from the Secretary to charge a fixed fee beyond the upper or lower limits by following the process described in paragraph (e)(2)(vii)(A) of this section. A certified IDR entity may also seek advance written approval from the Secretary to update its fees one additional time per calendar year by meeting the requirements described in paragraph (e)(2)(vii)(A). The Secretary will approve a request to charge a fixed fee beyond the upper or lower limits for fees as set forth in rulemaking, or to update the fixed fee during the calendar year if, in their discretion, they determine the information submitted by a certified IDR entity or IDR entity seeking certification demonstrates that the proposed change to the certified IDR entity fee would ensure the financial viability of the certified IDR entity or IDR entity seeking certification and would not impose on parties an undue barrier to accessing the Federal IDR process.

(A) In order for the certified IDR entity or IDR entity seeking certification to receive the Secretary’s written approval to charge a fixed fee beyond the upper or lower limits for fees as set forth in rulemaking or to update the fixed fee during the calendar year, the certified IDR entity or IDR entity seeking certification must submit to the Secretary, in the form and manner specified by the Secretary:

(1) The fixed fee the certified IDR entity or IDR entity seeking certification believes is appropriate for the certified IDR entity or IDR entity seeking certification to charge;

(2) A description of the circumstances that require the alternative fixed fee, or that require a change to the fixed fee during the calendar year, as applicable; and

(3) A detailed description that reasonably explains how the alternative fixed fee or the change to the fixed fee

during the calendar year, as applicable, will be used to mitigate the effects of those circumstances.

(B) [Reserved]

(viii) For disputes initiated on or after January 22, 2024, certified IDR entities are permitted to charge a fixed certified IDR entity fee for single determinations within the range of \$200 to \$840, and a fixed certified IDR entity fee for batched determinations within the range of \$268 to \$1,173, unless a fee outside such ranges is approved by the Secretary pursuant to paragraph (e)(2)(vii)(A) of this section. As part of the batched determination fee, certified IDR entities are permitted to charge an additional fixed tiered fee within the range of \$75 to \$250 for every additional 25 line items within a batched dispute, beginning with the 26th line item. The ranges for the certified IDR entity fees for single and batched determinations will remain in effect until changed by notice and comment rulemaking.

\* \* \* \* \*

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### 49 CFR Subtitle A

For the reasons stated in the preamble, the Department of Health and Human Services amends 45 CFR part 149 as set forth below:

### PART 149—SURPRISE BILLING AND TRANSPARENCY REQUIREMENTS

■ 6. The authority citation for part 149 continues to read as follows:

**Authority:** 42 U.S.C. 300gg–92 and 300gg–111 through 300gg–139, as amended.

■ 7. Section 149.510 is amended by:

- a. Revising paragraph (d)(2)(ii);
- b. Adding paragraph (d)(3);
- c. Removing the semicolon at the end of paragraphs (e)(2)(iii) and (vi) and adding a period in its place;
- d. Revising paragraph (e)(2)(vii);
- e. Redesignating paragraphs (e)(2)(viii) through (xi) as paragraphs (e)(2)(ix) through (xii);
- f. Adding new paragraph (e)(2)(viii);
- g. Removing the semicolon at the end of newly redesignated paragraphs (e)(2)(ix) and (x) and adding a period in its place; and
- h. Removing “; and” at the end of newly redesignated paragraph (e)(2)(xii) and adding a period in its place.

The revisions and additions read as follows:

#### § 149.510 Independent dispute resolution process.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(ii) The administrative fee amount will be established through notice and comment rulemaking no more frequently than once per calendar year in a manner such that the total administrative fees paid for a year are estimated to be equal to the amount of expenditures estimated to be made by the Secretaries of the Treasury, Labor, and Health and Human Services for the year in carrying out the Federal IDR process. The administrative fee amount will remain in effect until changed by notice and comment rulemaking. For disputes initiated on or after January 22, 2024, the administrative fee amount is \$115 per party per dispute.

(3) *Severability.* (i) Any provision of this paragraph (d) or paragraphs (e)(2)(vii) and (viii) of this section held to be invalid or unenforceable as applied to any person or circumstance shall be construed so as to continue to give the maximum effect to the provision permitted by law, including as applied to persons not similarly situated or to dissimilar circumstances, unless such holding is that the provision of this paragraph (d) or paragraphs (e)(2)(vii) and (viii) is invalid and unenforceable in all circumstances, in which event the provision shall be severable from the remainder of this paragraph (d) or paragraphs (e)(2)(vii) and (viii) and shall not affect the remainder thereof.

(ii) The provisions in this paragraph (d) and paragraphs (e)(2)(vii) and (viii) of this section are intended to be severable from each other.

(e) \* \* \*

(2) \* \* \*

(vii) Provide, no more frequently than once per calendar year, a fixed fee for single determinations and a separate fixed fee for batched determinations, as well as an additional fixed tiered fee for batched determinations, if applicable, within the upper and lower limits for each, as established by the Secretary in notice and comment rulemaking. The certified IDR entity fee ranges established by the Secretary in rulemaking will remain in effect until changed by notice and comment rulemaking. The certified IDR entity may not charge a fee outside the limits set forth in rulemaking unless the certified IDR entity or IDR entity seeking certification receives advance written approval from the Secretary to charge a fixed fee beyond the upper or lower limits by following the process described in paragraph (e)(2)(vii)(A) of this section. A certified IDR entity may also seek advance written approval from the Secretary to update its fees one additional time per calendar year by meeting the requirements described in

paragraph (e)(2)(vii)(A). The Secretary will approve a request to charge a fixed fee beyond the upper or lower limits for fees as set forth in rulemaking or to update the fixed fee during the calendar year if, in their discretion, they determine the information submitted by a certified IDR entity or IDR entity seeking certification demonstrates that the proposed change to the certified IDR entity fee would ensure the financial viability of the certified IDR entity or IDR entity seeking certification and would not impose on parties an undue barrier to accessing the Federal IDR process.

(A) In order for the certified IDR entity or IDR entity seeking certification to receive the Secretary's written approval to charge a fixed fee beyond the upper or lower limits for fees as set forth in rulemaking or to update the fixed fee during the calendar year, the certified IDR entity or IDR entity seeking certification must submit to the Secretary, in the form and manner specified by the Secretary:

(1) The fixed fee the certified IDR entity or IDR entity seeking certification believes is appropriate for the certified IDR entity or IDR entity seeking certification to charge;

(2) A description of the circumstances that require the alternative fixed fee, or that require a change to the fixed fee during the calendar year, as applicable; and

(3) A detailed description that reasonably explains how the alternative fixed fee or the change to the fixed fee during the calendar year, as applicable, will be used to mitigate the effects of those circumstances.

(B) [Reserved]

(viii) For disputes initiated on or after January 22, 2024, certified IDR entities are permitted to charge a fixed certified IDR entity fee for single determinations within the range of \$200 to \$840, and a fixed certified IDR entity fee for batched determinations within the range of \$268 to \$1,173, unless a fee outside such ranges is approved by the Secretary, pursuant to paragraph (e)(2)(vii)(A) of this section. As part of the batched determination fee, certified IDR entities are permitted to charge an additional fixed tiered fee within the range of \$75 to \$250 for every additional 25 line items within a batched dispute, beginning with the 26th line item. The ranges for the certified IDR entity fees for single and batched determinations will remain in effect until changed by notice and comment rulemaking.

\* \* \* \* \*

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